south line of Dixie Drive, from said ¾" galvanized iron pipe;

13 Thence in a northeasterly direction curving to the left with the south line of Dixie Drive describing an arc having a radius of 3155.4', a distance of 69.5', to a point from whence the initial point of this description bears south 39° 58 min. west 69.5';

Thence north 68° 20 min. east 963.9';

Thence north 81° 55 min. east 1431.3';

Thence south 89° 03 min. east 1019.4' to a point from whence a 3/8" galvanized iron pipe at the northwest corner of the Mrs. Anna Gill 1-acre tract bears north 54° 14 min. east 354.2';

Thence south 67° 29 min. east 346.5' to a point in the center line of Sims Bayou;

Thence south 22° 31 min. west 33' along the center line of said Bayou to a point;

Thence north 67° 29 min. west 343.4';

Thence north 89° 03 min. west 1010.6';

Thence south 81° 55 min. west 1424.7';

Thence south 68° 20 min. west 1021.1' to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipeline, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

14 1. Rosa Allen Williams, whose address is in care of the Rice Hotel, Houston, Texas.

PARCEL NO. 5

Being a tract of land containing 0.8936 acres more or less, having a width of 33' and a total center line length

of 1179.5', and being out of that certain 17.3 acres of land in the John R. Harris Survey, Abstract 27, in Harris County, Texas, and being the same land conveyed to Marcita Drouet Link by deed dated March 30, 1935, recorded in Volume 855, page 684, Deed Records, Harris County, Texas; said 0.8936 acres being more fully described as follows:

Beginning at a point in the east right-of-way line of Telephone Road, said point being the northwest corner of said 17.3 acres;

Thence north 78° 03 min. east 242' along the north line of said 17.3 acres to a point for the northwest corner and place of beginning of the 0.8936 acre tract herein described;

Thence north 78° 03 min. east 43.9' along said north line to a point;

Thence south 53° 15 min. 327.3';

Thence 83° 00 min. east 827.2' to a point in the east line of said 17.3 acres, said east line being also the west line of the Abbie Dell Drouet Meroney 19.5 acre tract;

Thence south 01° 17 min. west 33.2' along said east line to a point distant north 01° 17 min. east 133.1' along said east line from the southeast corner of said 17.3 acre tract;

Thence north 83° 00 min. west 839.2';

Thence north 53° 15 min. west 365.1' to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Marcita Drouet Link, whose place of residence is unknown.

PARCEL NO. 6

Being a tract of land containing 1.9103 acres of land more or less, exclusive of that portion of 0.0989 acres lying in the county road, having a width of 33 ft. and a total center line length of 2652.1 ft. and being out of that certain lot or tract No. 7 of Dixie Land Subdivision being 149.738 acres of H. B. Prentiss Survey Abstract No. 56 in Harris County, Texas, being same land described in deed to A. J. Shudde, et al, recorded in Volume 666, page 101, Deed Records, Harris County, Texas.

Beginning at a point in the west line of said lot No. 7 distant north 12° 22 min. west 341.4 ft. along said west line from the southwest corner, for the southwest corner and place of beginning of the 1.9013 acres of land herein described:

Thence continuing north 12° 22 min. west along said west line 33 ft.;

Thence north 77° 38 min. east 33.2′;

Thence north 59° 49 min. east 2503.4′;

16 Thence north 68° 20 min. east 144.4′ to a point in the center line of a 60 ft. wide curved county road from whence the long cord of the subsequent call bears south 41° west 71.8′; from whence the long cord to the point of compound curvature of said curve bears south 46° 02 min. west 619.9′;

Thence curving to the right along the center line of said curved county road, having a radius of 3125.4′, describing a curve having a degree of curvature of 1° 50 min. and generating a central angle of 1° 19 min., a total distance of 71.8′ to a point from whence the point of compound curvature of said curve bears south 46° 42 min. west 548.5′;

Thence south 68° 20 min. west 78.2′;

Thence south 59° 49 min. west 2506.2′;

Thence south 77° 38 min. west 38.4′ to the point of beginning.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 102

UNITED STATES OF AMERICA, PETITIONER,

vs.

C. M. DOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari
Filed April 11, 1957
Certiorari Granted May 27, 1957

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. A. J. Shudde, whose address is 4510 Woodside, Houston, Texas.

17 PARCEL NO. 7-A

Being a tract of land containing 2.8507 acres more or less, having a width of 33' and a total center line length of 3762.87' and being out of that certain 489.24 acres of land more or less in the Callahan and Vince Leagues, Abstract 9, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas, said 2.8507-acre tract more particularly described as follows:

Beginning at a point in the east or northeast line of certain 22' wide right-of-way conveyed to Houston Lighting & Power Company as tract 1 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas, said point being also the east or northeast corner of a certain 1-acre tract heretofore conveyed to G. H. Threadgill by deed recorded in Volume 1136, page 633, Deed Records of Harris County, Texas,

Thence N. 55° 47' W. 33.00 ft. along the north line of said 1-acre tract to a point.

Thence N. 34° 13' E. 3770.92 ft. parallel with and 33.00' perpendicular to said 22 ft. wide Houston Lighting & Power Company's right-of-way to a point in the west or southwest line of Allen Genoa road.

Thence S. 29° 46′ E. 36.72′ along said west line to the east or northeast corner of said Houston Lighting & Power Company's 22′ wide right-of-way.

Thence S. 34° 13′ W. 3754.82′ along the west or northwest line of said 22 ft wide tract to the point of beginning.

18 That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Estate of Rosa C. Allen, deceased, address unknown.

PARCEL NO. 7-B

Being a tract of land containing 3.7648 acres more or less having a width of 33′ and a total center line length of 4969.57′ and being out of those certain 489,24 acre and 484.69 acre tracts of land in the Callahan and Vince Leagues, Abstract 9 and the William Vince League, Abstract 78, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas.

Beginning at a point in the east or northeast line of the Allen Genoa road, said point being also the west or northwest corner of a certain 22′ wide right-of-way conveyed to Houston Lighting & Power Company as Tract 2 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas.

Thence N. 29° 46′ W. 36.72′ along said east line of the Allen Genoa road to a point.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 102

UNITED STATES OF AMERICA, PETITIONER,

vs.

C. M. DOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Thence 34° 13′ E. 429.04′ parallel with and 33′ perpendicular to the west or northwest right-of-way line of said 22′ wide right-of-way to a point.

Thence N. 42° 02′ E. 4553.14′ parallel with and 33′ perpendicular to said west or northwest line of said 22′ wide right-of-way to a point in the west line of Van Dorn road.

Thence S. 00° 11′ W. 49.46′ along said west line to north corner of said 22′ wide Houston Lighting & Power Company's right-of-way.

Thence S. 42° 02′ W. 4514.05′ along the west or northwest line of said 22′ wide right-of-way to a point.

Thence S. 34° 13′ W. 442.90′ along said west or northwest line of said 22′ wide right-of-way to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Estate of Rosa C. Allen, deceased, address unknown.

That in addition to the foregoing, the following are believed to assert some character of claim or lien against all of the foregoing tracts of land, to wit:

State of Texas
Harris County, Texas

VIII.

The estate taken for said public uses and purposes is as follows: perpetual right-of-way for the above specified purposes as to all of said tracts.

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IX.

The information acquired by the petitioner indicates that the parties hereinabove named are the reputed owners or are the claimants of some interest hereinbefore described, and they are made parties-defendant herein.

X.

That in addition to all of the parties named above, there may be other persons who may own some part of, or may have some interest in some part of, or lien or encumbrance on or against said land, or claiming or holding some right, title or interest therein whose names are unknown, and petitioner avers that reasonable diligence has been used to ascertain the same without success, and that all persons, firms, or corporations, known or unknown, having any right, title, interest, demand, lien, encumbrance or claim of any kind or character whatsoever are made parties-defendant to this action.

WHEREFORE, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will forthwith appoint three disinterested freeholders out of the county of Harris, State of Texas, as Commissioners to appraise and fix the value of said lands and the amount of compensation to which the owners thereof are entitled for such appropriation by the petitioner herein
21 and to issue notice of the proceeding as required by law, and will make and have entered all such orders, judgments and decrees as may be necessary to bring all of the unknown owners of said land before this Court, and to make all unknown persons, firms and corporations, having or claiming any interest therein, parties-defendant herein, all as provided by law.

Your petitioner further prays that an order may be entered in this cause providing, authorizing and directing the United States of America, the petitioner herein, to take immediate possession of each and all of the lands and the various interests therein as hereinbefore set out to the extent of the interest to be acquired by the United States of America and proceed with such public works thereon as have been authorized by Congress as above alleged.

Your petitioner further prays that this Honorable Court will make and have entered all such further orders, judgments and decrees as may be necessary to vest the entire and unencumbered interest being condemned in and to the lands hereinabove described in the United States of America upon payment into the registry of the Court of a just compensation therefor, and to make just distribution of the final award among those entitled thereto as expeditionsly as possible, and to grant such other and further relief, general and special, to which your petitioner may be entitled.

UNITED STATES OF AMERICA,
By DOUGLAS W. MCGREGOR,
United States Attorney
H. L. LEWIS
H. L. Lewis
Special Assistant to the
United States Attorney

22 Duly sworn to by H. L. Lewis
(Jurat omitted in printing)

23 IN UNITED STATES DISTRICT COURT

Judgment on Declaration of Taking—Filed, May 31, 1946

This cause coming on to be heard upon the motion of petitioner, United States of America, to enter a judgment on the Declaration of Taking filed in this cause on May 31, 1946, and upon consideration thereof and of the condemnation petition filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed for in said petition.

Second, that said petition in condemnation was filed at the request of the Secretary of the Reconstruction Finance Corporation, the authority empowered to acquire the lands described in said petition, and also under the authority of the Attorney General of the United States; and that heretofore on March 9, 1943, this Court entered and filed an

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Appellant's Amended Designation of Contents of Record on Appeal—Filed, April 25, 1956

C. M. DOW, defendant herein, hereby designates under Rule 75 of the Federal Rules of Civil Procedure the following to constitute the Transcript of Record on Appeal in the above entitled case.

1. Petition in Condemnation filed March 9, 1943.
2. Judgment on Declaration of Taking filed May 31, 1946.
3. Second Amendment to Petition in Condemnation filed October 3, 1946.
4. Summary Judgment Dismissing C. M. Dow as a Party Defendant, dated March 29, 1956.
5. C. M. Dow's Notice of Appeal and Bond.
6. Statement of Points to be Relied Upon by Appellant, C. M. Dow.
7. This Amended Designation of Contents of Record on Appeal.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

order granting to the United States of America immediate possession of the hereinafter described property, along with other property.

Third, that said petition and said declaration of taking state the authority under which and the public uses for which said lands were taken; that the Secretary, or the Assistant Secretary, of the Reconstruction Finance Corporation are duly authorized and empowered by law to acquire such lands such as are described in the petition and in said declaration of taking; that the Attorney General of the United States of America is the person authorized by law to direct the institution of such condemnation proceedings.

Fourth, that a proper description of the lands sought to be taken sufficient for identification thereof, is set out in said declaration of taking.

Fifth, that said declaration of taking contains a statement of the estate or interest in said land taken for said public use.

Sixth, that a plat showing the lands taken is incorporated in said declaration of taking.

Seventh, that a statement is contained in said declaration of taking showing a sum of money estimated by said acquiring authority to be just compensation for said lands, and that said sum was deposited in the registry of this Court for the use of the persons entitled thereto upon and at the time of the filing of said declaration of taking.

Eighth, that a statement, is contained in said declaration of taking that the amount of the ultimate award of compensation for the taking of said property, in the opinion of the acquiring authority, will be within any limits prescribed by Congress as to the price to be paid therefor.

It is, therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said declaration of taking, and the depositing in the registry of this Court of the sum of $3,801.30, a perpetual right-of-way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of a pipe line, or pipe lines, for the

2 **Certificate of Service**

(omitted in printing)

IN THE UNITED STATES DISTRICT COURT

Designation of Appellee—Filed April 24, 1956

NOW COMES Appellee, United States of America and, in addition to the matters designated by Appellant, C. M. Dow, hereby designates the additional instruments to be included in the record of the appeal by C. M. Dow, to-wit:

1. Motion filed October 6, 1949 by the United States of America for an Order Setting Aside Report of Commissioners.

2. Entry made by Judge Kennerly on Motion Calendar on November 1, 1949.

3. Order dated April 3, 1956, Setting Aside Award of Commissioners.

4. Motion filed May 6, 1955 by United States of America for Summary Judgment Dismissing Claim of C. M. Dow.

3 5. Motion filed the 5th day of March, 1956, by Houston Bank & Trust Company, et al, Withdrawing Waiver and Claiming Compensation.

UNITED STATES OF AMERICA
By /s/ SCOTT W. KEY
Assistant United States Attorney

Certificate of Service

(omitted in printing)

transportation of petroleum products or any other material or substance which can be transported through a pipe line, in, over and across the following described tracts of land:

EXHIBIT "A"

Humble Pipe Line Co.
P. 1537

The land which shall be the subject matter of condemnation proceedings is situate in Harris County, State of Texas, and is more particularly described as follows:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616 acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrett by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a sub-division of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′

4 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOLDING SESSIONS AT HOUSTON

No. 955 Civil Action

United States of America, *Plaintiff*

-vs-

15.8753 Acres of land, More or Less, in Harris County, Texas, and James Bute, et al., *Defendants*

CAPTION

BE IT REMEMBERED: That in the above entitled and numbered cause, lately pending in said Court, in which a Summary Judgment Dismissing C. M. Dow as a Party Defendant was rendered at the Regular February 1956 Term of said Court, to-wit:

On the 29th day of March A. D. 1956, the Honorable Ben C. Connally, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

* * * * * * * * * * *

5 IN THE UNITED STATES DISTRICT COURT

Petition in Condemnation—Filed, March 9, 1943

To the Honorable the Judges of the United States District Court for the Southern District of Texas:

Now comes the United States of America, a sovereign, petitioner herein, by and through Douglas W. McGregor, United States Attorney, and H. L. Lewis, Special Assistant to the United States Attorney, for the Southern District of Texas, and at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Administrator of the Federal Works Agency of the United States, and represents to the Court:

from a 1" iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. west 3581.1';

Thence north 83° 0 min. west 1.3', to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8' to the point of beginning.

PARCEL NO. 7-A

Being a tract of land containing 2.8507 acres more or less, having a width of 33' and a total center line length of 3762.87' and being out of that certain 489.24 acres of land more or less in the Callahan and Vinee Leagues, Abstract 9, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas, said 2.8507-acre tract more particularly described as follows:

Beginning at a point in the east or northeast line of a certain 22' wide right-of-way conveyed to Houston Lighting & Power Company as tract 1 by deed dated April 15, 1925, and recorded in Volume 61[illegible], page 106, Deed Records of Harris County, Texas, said point being also the east or northeast corner of a certain 1-acre tract heretofore conveyed to G. H. Threadgill by deed recorded in Volume 1136, page 633, Deed Records of Harris County, Texas.

27 Thence N. 55° 47' W. 33.00 ft. along the north line of said 1-acre tract to a point.

Thence N. 34° 13' E. 3770.92 ft. parallel with and 33.00' perpendicular to said 22 ft. wide Houston Lighting & Power Company's right-of-way to a point in the west or southwest line of Allen Genoa road.

Thence S. 29° 46' E. 36.72' along said west line to the east or northeast corner of said Houston Lighting & Power Company's 22' wide right-of-way.

I.

That this petition is filed under and by virtue of the Acts of Congress authorizing the filing of same, some of which are as follows:

The Act of August 1, 1888, (25 Stat. 357 (40 U. S. C., Section 257);

The Act of October 14, 1940 (Public No. 849, 76th Congress), as amended by the Act of June 28, 1941 (Public No. 137, 77th Congress), 50 U. S. C., Section 171, as supplemented by Title II of the Second War Power's Act, 1942, and Executive Order No. 9186, and pursuant to the provisions contained in the Act of Congress, approved January 22, 1932 (15 U. S. C. 601-617) as amended by Public Law No. 507—77th Congress, approved March 27, 1942, and Executive Order No. 9217 issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in Title II of the Second War Powers Act of 1942.

II.

That the public uses for which the hereinafter described lands and interests are to be acquired as follows: The said lands and interests therein are necessary for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and said lands and the interests in said lands have been selected for use in connection with the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines and for such other uses as may be authorized by Congress.

III.

That under the authority of said Executive Order No. 9217, the Administrator of the Federal Works Agency has selected for acquisition by the United States of America the interests in the lands hereinafter described, and has designated that said lands and the hereinafter specified title and interests in said lands are suitable for the purpose.

Thence S. 34° 13′ W. 3754.82′ along the west or northwest line of said 22 ft. wide tract to the point of beginning.

PARCEL NO. 7-B

Being a tract of land containing 3.7648 acres more or less having a width of 33′ and a total center line length of 4669.57′ and being out of those certain 489.24 acre and 484.69 acre tracts of land in the Callahan and Vince Leagues, Abstract 9 and the William Vince League, Abstract 78, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas.

Beginning at a point in the east or northeast line of the Allen Genoa road, said point being also the west or northwest corner of a certain 22′ wide right-of-way conveyed to Houston Lighting & Power Company as Tract 2 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas.

Thence N. 29° 46′ W. 36.72′ along said east line of the Allen Genoa road to a point.

Thence 34° 13′ E. 429.04′ parallel with and 33′ perpendicular to the west or northwest right-of-way line of said 22′ wide right-of-way to a point.

28 Thence N. 42° 02′ E. 4553.14′ parallel with and 33′ perpendicular to said west or northwest line of said 22′ wide right-of-way to a point in the west line of Van Dorn road.

Thence S. 00° 11′ W. 49.46′ along said west line to north corner of said 22′ wide Houston Lighting & Power Company's right-of-way.

Thence S. 42° 02′ W. 4514.05′ along the west or northwest line of said 22′ wide right-of-way to a point.

Thence S. 34° 13′ W. 442.90′ along said west or northwest line of said 22′ wide right-of-way to the point of beginning.

of the United States of America, and that said selection, designation and determination have been and are now in full force and effect.

IV.

That the Congress of the United States of America has appropriated and made available funds for the acquisition of such lands and interests therein and the establishment of said project.

7

V.

That under proper acts of Congress and said Executive Order No. 9217, the Administrator of the Federal Works Agency has determined and is of the opinion that it is useful, appropriate, necessary, advantageous and to the interest of the United States of America to acquire the hereinafter specified title and interests to land as hereinafter described by condemnation under judicial process, and has made application to the Attorney General of the United States of America to cause such proceedings to be commenced, in pursuance of which application the Attorney General of the United States has instructed and directed the United States Attorney for the Southern District of Texas to institute this proceeding.

VI.

That the United States of America institutes this proceeding to acquire said land and interests therein at a fair, reasonable just compensation.

VII.

That the land and interests in said land sought to be acquired by this proceeding consist of eight parcels, aggregating 15.8753 acres of land in Harris County, Texas, said tracts together with the reputed and purported owners and claimants thereof, and the interests sought to be acquired therein being described by metes and bounds as follows:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616

ESTIMATED JUST COMPENSATION

Parcel No. 1	$1,151.30
Parcels No. 7-A and 7-B	$2,650.00

vested in the United States of America upon the filing of said declaration of taking and the depositing in the registry of the court of the said estimated compensation, and said lands are deemed to have been condemned and taken for the use of the United States of America, and the rights to just compensation for the property taken, upon the filing of said declaration of taking and the making of said deposit, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law; and

That the United States of America has taken possession of the above described premises under and by virtue of said order of possession heretofore mentioned, and
29 this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises.

ORDERED at Houston, Texas, this the 31 day of May, 1946.

/s/ T. M. KENNERLY,
United States District Judge

IN UNITED STATES DISTRICT COURT

Second Amendment to Petition in Condemnation—Filed October 3, 1946

TO THE HONORABLE T. M. KENNERLY, UNITED STATES DISTRICT JUDGE:

COMES NOW petitioner, United States of America, and respectfully represents and shows to the Court that since the filing of the original Petition in Condemnation herein, information gained by petitioner, and believed to be reliable, reflects that certain persons, firms and concerns who have not been made party defendant to this proceeding own, claim or assert some character of right, title or interest in and to the tracts of land in this proceeding

acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a subdivision of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Mcroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. west 3581.1′;

Thence north 83° 0 min. west 1.3′, to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8′ to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transporta-

tion of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named are the owners or assert some character of claim against the foregoing tract:

1. James Bute, whose address is c/o James Bute Co., 1301 McKinney, Houston, Texas

2. John F. Garrott, whose place of residence is unknown

PARCEL NO. 2

Being a tract of land containing 0.2302 acres more or less, having a width of 33′ and a total center line length of 303.8′ and being out of the northwest corner of that certain E. N. Drouet original 353 acre tract in the J. R. Harris Survey, Abstract 27, Harris County, Texas, recorded in Volume 612, page 167, Deed Records, Harris County, Texas, lying east of Telephone Road and between the north line of a 17.3 acre tract conveyed to Marcita Drouet Link and Sims Bayou; said 0.2302 acre tract more fully described as follows:

Beginning at a point in the east right-of-way line of Telephone Road, said point being also the northwest corner of a certain 17.3 acre tract of land conveyed to Marcita Drouet Link by deed recorded in Volume 855, page 684, Deed Records, Harris County, Texas;

Thence north 01° 17 min. east 201′ along the east line of Telephone Road, being also the west line of the E. N. Drouet tract to a point for the most northerly southwest corner and place of beginning of the 0.2302 acre tract herein described,

Thence continuing north 01° 17 min. east 35.4′ along said west line to a point;

Thence south 67° 29 min. east 91.3′;

Thence south 53° 15 min. east 237.6′, to a point in the common line between the E. N. Drouet tract and the Marcita Drouet Link 17.3 acres;

designated as Parcels Nos. 1, 7A and 7B in the pleadings filed herein by petition, and that it is necessary in order to properly and completely effectuate the condemenation of said lands that such additional persons and concerns be made parties to this cause of action.

Therefore, with leave of the Court, petitioner files this its Second Amendment to Petition in Condemnation, and by such Amendment makes the following persons and concerns defendant in this proceeding the same as if they had been named in petitioner's original Petition in Condemnation and other pleadings filed herein, said additional persons, concerns and firms being as follows: C. M. Dow; Houston Bank & Trust Company (formerly Houston Land & Trust Company) as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Day, a feme sole; Dorothy Elizabeth Franklin, a feme sol; Agnes B. Nickle and husband, Donald C. Nickle; Guardian Trust Company, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute III; Mary Elizabeth Nemeth and husband, Theodore J. Nemeth; John Bute; Lois Bute Porter and husband, Randon Porter, Jr.; Gulf Refining Company; Sinclair Refining Company; S. M. Briscoe; Gulf Pipe Line Company; Houston Lighting and Power Company; and Sinclair-Texas Pipe Line Company.

In all other respects the pleadings herein previously filed shall remain in full force and effect, and the relief therein sought is now prayed for as against all of the above named parties as was sought against the persons named and included in the previous pleadings filed herein by petitioner.

UNITED STATES OF AMERICA, Petitioner,

By /s/ BRIAN S. ODEM
Brian S. Odem
United States Attorney

By /s/ H. L. LEWIS
H. L. Lewis
Special Assistant

Thence south 78° 03 min. west 43.9′ along said common line to a point distant north 78° 03 min. east 242′ along said common line from the above mentioned common corner lying in the east line of Telephone Road;

Thence north 53° 15 min. west 204.5′;

Thence north 67° 29 min. west 74.3′, to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line; and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim again the foregoing tract:

11 1. E. N. Drouet, whose address is 4773 Calhoun Road, Houston, Texas.

PARCEL NO. 3

Being a tract of land containing 0.6466 acres more or less, having a width of 33′ and a total center line length of 853.5′ and being out of that certain 19.5 acres of land in the J. R. Harris Survey, Abstract 27, Harris County, Texas, and being the same land conveyed to Abbie Dell Drouet Meroney by deed dated March 30, 1935, and recorded in Volume 855, page 728, deed records of Harris County, Texas; said 0.6466 acre tract more fully described as follows:

Beginning at a point in the west line of said 19.5 acres, said west line being also the east line of the Marcita Drouet Link 17.3 acre tract, said point being distant north 01° 17 min. east 133.1′ along said west line from the southwest corner of said 19.5 acre tract;

Thence north 01° 17 min. east 33.2′ along said west line to a point;

Thence south 83° 00 min. east 853.2′ to a point in the east line of said 19.5 acres; said east line being also the west line of the James Bute Estate lands;

31 IN UNITED STATES DISTRICT COURT

Order Allowing Filing of Second Amendment to Petition in Condemnation—Filed, Oct. 3, 1946

Pursuant to the request of the United States of America, petitioner herein, leave is hereby granted to file the above and foregoing Second Amendment to the original Petition in Condemnation.

/s/ T. M. KENNERLY
United States District Judge

DONE at Houston, Texas,
this 3 day of October, 1946.

IN UNITED STATES DISTRICT COURT

Plaintiff's Motion to Set Aside Commissioners' Award and Direct a Rehearing—Filed, October 6, 1949

Now comes petitioner, United States of America, and respectfully shows to the Court:

1. That petition in condemnation in the above-numbered and styled cause was filed on March 9, 1943, for the purpose of condemning permanent right-of-way easements for oil and gas pipe lines across eight tracts of land in Harris County, Texas, including one right-of-way easement of 2.7139 acres designated as Parcel No. 1 in said proceeding.

2. That on the date of the filing of said petition, to wit, March 9, 1943, petitioner requested of and secured from the United States District Judge an order granting
32 to petitioner immediate possession of the lands described in said petition, including said Parcel No. 1 and a copy of said order of possession is hereto attached, marked "Exhibit A" and made a part hereof.

3. That within ten days after the date of said order of possession, Petitioner, United States of America, or parties acting under and at the direction of petitioner, entered into the actual physical possession of the 2.7139 acres of land designated as Parcel No. 1 in this proceeding and commenced laying a pipe line for oil or gas thereon; that the laying of said pipe line in and along said Parcel No. 1

Thence south 0° 30 min. west 33.8′ along said east line to a point distant north 0° 30 min. east 40.2′ along said east line from the southeast corner, said southeast corner being also the northeast corner of Broadview Addition;

Thence north 76°05 min. west 4.5′;

Thence north 83° 00 min. west 849.3′ to the point of beginning.

12 That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Abbie Dell Drouet Meroney, whose place of residence is unknown.

PARCEL NO. 4

Being a tract of land containing 2.8652 acres of land more or less, having a width of 33 ft. and a total center line length of 3782′ and being out of that certain 111.94 acres of land in the H. B. Prentiss Survey, Abstract 56 in Harris County, Texas, and being the same land conveyed as Tract One to Rosa Allen Williams by Partition deed dated September 23, 1942, recorded in Volume 1256, page 421, Deed Records of Harris County, Texas, the said 2.8652 acre tract being more particularly described as follows:

Beginning at a point in the most northerly northwest line of said 111.94 acres, said northwest line being also the south line of the south loop of Dixie Drive from whence a ¾″ iron pipe marking the west corner of said 111.94 acre tract bears south 41° 44 min. west 124.6′ said point being distant 124.6′ measured along a curve having a radius of 3155.4′, described by said

was completed in the year 1943 and said pipe line has been continuously used since its completion for the transportation of oil or gas. That petitioner offers the affidavit of M. W. Lee in support and proof of the facts alleged in this paragraph which affidavit is hereto attached, marked "Exhibit B" and made a part hereof.

4. That on May 31, 1946, petitioner filed its Declaration of Taking of all of the lands involved in this proceeding and on said date deposited a sum of money in the registry of the court as the estimated compensation for the taking of said Parcel No. 1, all of which is apparent from the record in this cause.

5. That at the time of the commencement of this proceeding said Parcel No. 1 was out of and a part of a large tract of 617.289 acres belonging to the estate of and heirs of John F. Garrott, deceased, and the estate of and heirs of James Bute, deceased; that thereafter, by deed dated November 1, 1945, the Independent Executor under the will of John F. Garrott, deceased, and the heirs of James Bute, deceased conveyed said 617.289 acres of land to
33 the defendant herein, C. M. Dow. A copy of said deed is hereto attached marked "Exhibit C" and made a part hereof.

6. That on November 2, 1948, the Commissioners appointed by this Court held a hearing for the purpose of determining the compensation and damages due by the United States of America for the taking of said Parcel No. 1, and on November 16, 1948, filed in this court their written report and award, copy of which is hereto attached, marked "Exhibit D" and made a part hereof.

7. That the defendant, C. M. Dow, pursuant to notice served on him, and his attorney appeared at said Commissioners' hearing and offered evidence as to the value of said Parcel No. 1; that no other persons or their attorneys appeared at such hearing and that no other persons or concerns (except Houston Lighting & Power Company, Gulf Refining Company and Sinclair Refining Company, as owners of conflicting easements) were served with notice of such hearing as the attorney representing the United States of America as such hearing was then under the im-

pression that any parties other than C. M. Dow, deriving title through James Bute, deceased, and John F. Garrott, deceased, had no interest in said Parcel No. 1 and were not entitled to any compensation for the taking of the same. The facts alleged in this paragraph and the following paragraph are verified by the affidavit of Scott W. Key as Assistant to the United States Attorney, which affidavit is hereto attached marked "Exhibit E" and made a part hereof.

8. That, after a more thorough investigation of the law governing such matters, the attorney for petitioner, United States of America, has now reached the conclusion
34 that the defendant, C. M. Dow, is not entitled to the compensation and damages to be paid for the taking of said Parcel No. 1, and that the same rightfully belongs to and should be paid to the persons or concerns, who, as heirs or devisees of James Bute, deceased, and John F. Garrott, deceased, were the owners of the land in said Parcel on March 9, 1943, the date on which the United States of America took possession of said parcel.

9. That the said deed of conveyance to C. M. Dow, above mentioned, was executed by Bertha B. Day, Dorothy Elizabeth Franklin, Agnes B. Nickel, Don C. Nickel, James Bute III, John Bute, Mary Elizabeth Nemeth, Theodore J. Nemeth, Lois Bute Porter, Randon Porter, Jr., Guardian Trust Company, Executor and Trustee under the will of Alevia Bute Hill, deceased, and Houston Bank and Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased; that so far as petitioner knows and believes the said above-named persons and concerns were the owners of said Parcel No. 1 at the time the same was taken by the United States of America, subject to certain easement rights existing in favor of Houston Lighting and Power Company, Gulf Refining Company and Sinclair Refining Company; that the said above-named landowners should be made parties to this proceeding in order that they may present and assert their claims to the compensation and damages to be awarded for the taking of said Parcel No. 1, but the three easement owners, who are defendants herein, have no interest in the matters alleged in this motion, as each of them have executed stipu-

lations waiving any claim to the compensation to be paid for said parcel.

35 Wherefore, petitioner prays the Court for an order setting aside the Award of the Commissioners filed herein on November 16, 1948, and directing the Commissioner to have a re-hearing as to said Parcel No. 1 after due notice of the same has been served upon the landowners hereinabove named and upon C. M. Dow, defendant herein, to the end that the controversy of title, if any, between the said C. M. Dow and the other parties above named may be determined and settled by the Court. In this connection Petitioner alleges that it cannot safely pay out compensation for the taking of Parcel No. 1 until it has been judicially determined to whom the same should be paid.

UNITED STATES OF AMERICA

By SCOTT W. KEY,
Scott W. Key
Special Assistant to the
United States Attorney

* * *

NOTICE AND CERTIFICATE OF SERVICE

I, Scott W. Key, Special Assistant to the United States District Attorney, do hereby certify that on the 6th day of October, 1949, I mailed a copy of the above and foregoing motion, together with copies of the exhibits attached to the same, and a copy of this notice to E. A. Kelley, Attorney for the defendant, C. M. Dow, and Notice is hereby given that Petitioner moves the submission of said Motion to Court on Monday, October 24th, 1949.

SCOTT W. KEY
Attorney for Petitioner

36 **Exhibit "A" to Motion**

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

* * *

United States of America, :
Petitioner :

v. :

15.8753 Acres of Land, More or Less, in Harris County, Texas and James Bute, et al., : Civil Action No. 955
Defendants :

* * *

ORDER OF POSSESSION

This day came on before me to be heard the application of the United States of America for the immediate use, occupancy and possession of certain lands hereinafter described, and as described in the petition in condemnation herein filed, for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products, or any other material or substance that can be transported through a pipe line, and it appearing to me that the United States of America is authorized to acquire the interests in said lands, and that the United States of America is authorized in advance of the conclusion of the condemnation proceedings which have been instituted herein to have

37 the immediate use, occupancy and possession of said lands, and it further appearing to me that under the act of Congress approved March 27, 1942, (Public Law No. 507, 77th Congress), provision has been made for the payment of certain just and adequate compensation to the parties entitled thereto as a result of this condemnation suit, and it further appearing to the Court that the Administrator of the Federal Works Agency has certified officially that adequate appropriation for the payment of said just compensation to the parties entitled thereto has

been made; and it further appearing to the Court that the petitioner herein is seeking to condemn perpetual right-of-way in said tracts as hereinafter fully set out;

NOW, THEREFORE, on this 9 day of March, 1943, it is hereby ORDERED and DIRECTED that leave be and is hereby granted the United States of America to take immediate possession of said land, to wit:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616 acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a sub-division of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being
38 also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Develop-

ment Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. 3581.1';

Thence north 83° 0 min. west 1.3', to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8' to the point of beginning.

* * * * * * * * *

(Metes and bounds descriptions of Parcels Nos. 2, 3, 4, 5, 6, 7-A and 7-B, are omitted from this copy)

* * * * * * * * *

to the extent of the interest to be acquired by the United States of America and to proceed with such public works thereon as have been authorized by Congress.

It is further ORDERED that the Clerk of this Court send by registered mail a certified copy of this order to the alleged owners of the above described property and to any other persons in actual possession of said
39 property, whose addresses are known to the petitioner, such addresses to be forthwith furnished to said Clerk by said petitioner, but the mailing of such notice shall not in any wise affect the right herein granted to the petitioner to immediate possession of said premises. The Court specifically reserves the right to order such other and further notice to be given of this matter as may be deemed appropriate at any later date.

/s/ T. M. KENNERLY
United States District Judge

Done at Houston, Texas,
this 9 day of March,
A.D. 1943

Exhibit "B" to Motion

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared M. W. Lee, who, being by me duly swern, on his oath deposes and says:

That during the year 1943 he was familiar with the use and occupancy of Parcel No. 1 in Civil No. 955 pending on the docket of the United States District Court at Houston, Texas; that the said parcel was a right-of-way strip for an oil and gas pipe line across a large tract of land near Houston, Texas, belonging to the Heirs of James Bute, deceased, and the Heirs of John T. Garrott, deceased; that he has been informed that an order of possession was entered in the above-numbered condemnation proceeding by the United States District Judge on March 9, 1943; that within ten days after the entry of such order of possession, the United States of America or the pipeline contractor acting for the United States of America, commenced laying a pipeline over and across said Parcel No. 1; that the laying of said pipeline in and along said parcel was completed some time during the year 1943, and thereafter and in 1943, oil was flowing through said line and it has been constantly used since said time for the transportation of oil or gas; that affiant is acquainted with the above and foregoing facts because at said time he was employed by the Reconstruction Finance Corporation to inspect and appraise properties along the right-of-ways of the several tracts embraced in said condemnation proceeding, and on that account he had occasion to inspect and observe said lands many times during the year 1943.

M. W. LEE
M. W. Lee

Subscribed and sworn to before me on this the 6th day of October, 1949.

CAROLINE L. GRAHAM
Caroline L. Graham
Notary Public in and for
Harris County, Texas

Exhibit "C" to Motion

THE STATE OF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS: That we, Houston Bank & Trust Company (formerly Houston
41 Land & Trust Company) a corporation of Houston, Harris County, Texas, as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Dav, a feme sole, of McHenry County, Illinois; Dorothy Elizabeth Franklin, a feme sole, of Harris County, Texas; Agnes B. Nickle Joined pro forma by my husband, Donald C. Nickle, of Toronto, Canada; Guardian Trust Company, a corporation of Houston, Harris County, Texas, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute, III, of Harris County, Texas; Mary Elizabeth Nemeth joined pro forma by my husband; Theodore J. Nemeth, of New York City, New York; John Bute of Harris County, Texas; and Lois Bute Porter, joined pro forma by my husband, Randon Porter, Jr., the said Randon Porter, Jr., acting herein by and through his duly authorized agent and attorney in fact, Lois Bute Porter, of Harris County, Texas, all jointly hereinafter referred to as "Grantors", for and in consideration of the sum of Two Hundred and One Thousand One Hundred Eighteen & 77/100 Dollars (201,118.77) cash to us in hand paid by C. M. Dow, the receipt and sufficiency whereof is hereby acknowledged by Grantors; have Granted, Bargained, Sold, and Conveyed, and by these presents do Grant, Bargain, Sell, and Convey, unto the said C. M. Dow, of Houston, Harris County, Texas, and herein at times referred to as "Grantee", the following described real estate and property situated in and being a portion of the Jno. R. Harris Survey in the County of Harris and State of Texas, to wit:

FIRST TRACT: 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, and being a portion of lands now or formerly owned by J. F. Garrott
42 Estate and James Bute Estate, more particularly described as follows:

BEGINNING at a point in the most northerly northeast corner of a tract of land now or formerly of E. N.

Drouet and the most westerly northwest corner of a 400.0 acre, more or less, tract formerly known as the Mrs. R. J. Allen Tract; said point being a point in the center line of the old channel of Sims Bayou;

Running THENCE South, along an eastern line of said E. N. Drouet Tract, at 15.0 feet pass a 3/4 inch iron pipe on the southern bank of the said old channel of Sims Bayou; in all 105.0 feet to a re-entrant corner of said E. N. Drouet Tract, and a southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less acre tract;

THENCE East, along northerly line of said E. N. Drouet Tract and a southerly line of said Mrs. R. J. Allen 400.0, more or less, acre tract, at 296.0 feet pass a northeasterly fence corner; in all 445.0 feet to a 3/4 inch iron pipe set in the roots of the two 10-inch elms growing together on the west bank of a gully; said pipe marking the most easterly northeast corner of the said E. N. Drouet Tract and re-entrant corner to the said Mrs. R. J. Allen 400.0, more or less, acre tract;

THENCE S. 00 deg. 05 min. E., along the westerly line of the said Mrs. R. J. Allen 400.00, more or less, acre tract, at 165.4 feet pass a northeasterly fence corner and continuing from

THENCE, along an old fence and at 2889.4 feet across the center line of the Houston Lighting & Power Company's Highline, at 5122.4 feet pass the southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less,
43 acre tract, and the northwesterly corner of a 112.0, more or less, acre tract in the name of Mrs. J. Stubbs; in all 6531.4 feet to a 3/4 inch pipe set in dividing line between the Jno. R. Harris Survey and the D.W.C. Harris Survey, as fenced; said point marking the southwesterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract;

THENCE East, along said dividing line of the Jno. R. Harris and the D.W.C. Harris Surveys, as fenced, and along the southerly line of said Mrs. J. Stubbs 112.0, more or less, acre tract, and the northerly line of the Municipal Airport, as fenced and generally recognized, 3484.2 feet to a 3/4 inch pipe marking the southeasterly corner of the said Mrs. J. Stubbs Tract and the southwesterly corner of

a tract of land subdivided and known as Meadowbrook acres, as fenced;

THENCE N. 00 deg. 10 min. E. Along the easterly line of the said Mrs. J. Stubbs 112.0, more or less, acre tract and the westerly line of said Meadowbrook Acres, at 1409.0 feet pass the northeasterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract, and the southeasterly corner of a 117.0, more or less, acre tract, formerly in the name of C. D. Allen, and continuing

THENCE, along the easterly line of said C. D. Allen 117.0 more or less, acre tract, and the westerly line of said Meadowbrook Acres Subdivision, as fenced and generally recognized, at 4227.0 feet cross the center line of the said Houston Lighting & Power Company's Highline; in all 7451.0 feet to the northwesterly corner of said Meadowbrook Acres Subdivision as marked by a 3/4 inch pipe set in the southwesterly line of a right-of-way of the Galveston-Houston Interurban Railroad Company, as fenced and now abandoned;

44 THENCE N. 41 deg. 23 min. W., along the southwesterly line of said abandoned right of way, at 674.5 feet pass a 3/4 inch pipe; in all 802.5 feet to the center line of the old channel of Sims Bayou;

THENCE, following the center line of the old channel of Sims Bayou as it existed prior to the changing of its course by the Harris County Drainage District, and running in a westerly direction and with all of its meanderings to the place of beginning; containing, as aforesaid, 617.289 acres of land; as surveyed in October, 1945, by A. C. Stimson, C. E., County Surveyor of Harris County, Texas;

TO HAVE AND TO HOLD the above described property and premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said C. M. Dow, his heirs and assigns, forever; and the Grantors do hereby bind themselves, their heirs, successors, executors and administrators in the proportions and subject to the limitations hereinafter set forth, to warrant and forever defend all and singular said property and premises unto the Grantee, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof; save and except that no warranty,

either express or implied, is given by Grantors on or covering the aforesaid Tract 2, being the former right-of-way of Galveston-Houston Electric Railway Company; and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned; and also conditioned that the warranty of Houston Bank & Trust Company as Executor and Trustee of the Estate of John F. Garrott, deceased, and of Guardian Trust Company as Executor and Trustee of the Estate of Alevia Bute
45 Hill, deceased, shall be binding on such estates only to the extent that such estates may be legally bound. The title to the above property and premises is presently vested in Grantors in the following proportions, to wit:

Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, deceased, 1/2 thereof; Bertha B. Day 1/8 thereof; Dorothy Elizabeth Franklin 1/8 thereof; Agnes B. Nickle 1/16 thereof; Guardian Trust Company Executor and Trustee under the Will of Alevia Bute Hill, deceased 1/16 thereof; James Bute III 1/32 thereof; Mary Elizabeth Nemeth 1/32 thereof; John Bute 1/32 thereof; Lois Bute Porter 1/32 thereof; and as a part of the consideration hereof, it is understood and agreed that the liability, if any, of the Grantors herein on any warranty hereunder, shall be several and not joint, and no Grantor shall ever be held on such warranty, should the title to such property fail, except for the proportionate interest of such Grantor in and to said property as hereinabove set forth. It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings:

(a) That certain pipe line right-of-way easement dated November 4, 1920, recorded in Vol. 462, page 406 of the Harris County Deed Records from John Bute and R. A. Welch Trustees of the Estate of James Bute and John F. Garrott and John Bute to S. M. Briscoe:

(b) That certain pipe line right-of-way easement dated October 30, 1920, recorded in Vol. 465, page 9 of the Harris County Deed Records, from John Bute and R. A. Welch, Trustees, of the Estate of James Bute, deceased,
46 and John F. Garrott and John Bute to Gulf Pipe Line Company;

(c) An unrecorded easement for power line given to Houston Light & Power Company to cross the aforesaid property;

(d) Condemnation proceedings filed by the United States of America vs. James Bute *el* al, Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. Taxes against the aforesaid property for the current year of 1945 have been prorated and adjusted between the parties hereto, and under such adjustment such taxes are to be paid by and are assumed by the Grantee.

EXECUTED as of the 1st day of November, A. D. 1945.

Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the will and the Estate of John F. Garrott, deceased, and not individually, By O. R. Weyrich, President.

ATTEST: G. A. Holder, Cashier, [Seal]

Bertha B. Day
Dorothy Elizabeth Franklin
Agnes B. Nickle
Donald C. Nickle - pro forma
James Bute III
John Bute
Mary Elizabeth Nemeth

47

Theodore J. Nemeth - pro forma
Lois Bute Porter
Randon Porter, Jr.,
By Lois Bute Porter His Agent
and Atty-in-fact Guardian Trust Co.,
in its capacity as Executor and
Trustee under the will and of the
Estate of Alevia Bute Hill, deceased,
and not individually, By J. S. Whitworth, Vice-Pres.

ATTEST: Norman Sterling, Asst. Secretary [Seal]

COPY

Filed 11-16-48

Exhibit "D" to Motion

Houston, Texas
November 8th, 1948

Hon. Brian S. Odem
U. S. District Attorney
Houston, Texas

Attention: Mr. Scott W. Key
Land Department

Re: Civil Action No. 955
Milby Dow Tract
618 Acres. 2.7139 Acres.
Parcel No. 1

Dear Sir:

The undersigned Commissioners having inspected the land involved in the above captioned case, following the Commissioners Court Hearing on November 2nd, 48 1948, respectfully submit the following award to the land owner, to wit:

FOUR THOUSAND FOUR HUNDRED & FIFTY Dollars

($4,450.00)

As compensation for land taken, including all damages.

Respectfully,

D. BARKER
D. Barker

THOS. H. GUTHRIE
Thos. H. Guthrie

A. D. FOREMAN
A. D. Foreman
U. S. Commissioners

Exhibit "E" to Motion

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Scott W. Key, who, being by me duly sworn, on his oath deposes and says:

That since May 1, 1944, he has been serving as Special Assistant to the United States Attorney for the Southern District of Texas in the Houston Office; that his duties have been entirely connected with the Lands Division of said office, which division has charge of all condemnation proceedings; that after the resignation of H. L. Lewis as Assistant United States Attorney in 1947, affiant took charge of Civil No. 955; that on November 2, 1948, a hearing was had before the Special Commissioners for the purpose of determining the compensation and damages due by the United States for the taking of Parcel No. 1 in said proceeding; that only C. M. Dow, as owner of said land, was made a party to said proceeding as affiant had been informed that the said C. M. Dow purchased said land and affiant was under the impression that he is entitled to the compensation due for the taking of the same; that since said hearing affiant has made a more careful study of the title to said land and has learned that said C. M. Dow did not acquire the same until two years after the same had been taken by the United States of America and on that account the affiant is now of the opinion that the owners of said land at the time of the taking of the same are entitled to the compensation and should have been made parties to the said proceeding; that affiant knows of his own knowledge that the allegations set out in Paragraphs 7 and 8 are correct inasmuch as he took charge of said condemnation proceeding during the year 1947.

49

SCOTT W. KEY
Scott W. Key

Subscribed and sworn to before me on this the 6th day of October, 1949.

CAROLINE L. GRAHAM
Caroline L. Graham
Notary Public in and for
Harris County, Texas

50 IN UNITED STATES DISTRICT COURT

Entry Made by Judge Kennerly on Motion Calendar—Filed, Nov. 1, 1949.

"11-1-49: By agreement of counsel, the Motion of the Government for an Order setting aside Commissioners' Award and directing a Rehearing before the Commissioners is dropped from the Motion Calendar, without prejudice to the Government's right to bring same on for hearing on the Motion Calendar at a later date. Clerk will notify counsel.

T. M. K."

IN UNITED STATES DISTRICT COURT

Motion for Summary Judgment Dismissing the Claim of C. M. Dow—Filed, May 6, 1955

To The Honorable Judge of Said Court:

NOW COMES Petitioner, UNITED STATES OF AMERICA, and respectfully shows to the Court as follows:

I.

That this proceeding was commenced on the 9th day of March, 1943, by the filing of a Petition to condemn a right-of-way easement 33 feet in width over and across a tract of land in Harris County, Texas, out of the John R. Harris Survey, containing 617.289 acres of land; that the right-of-way easement sought to be condemned across said 617.289 acres contains 2.7139 acres of land and
51 is designated in the proceeding as Parcel No. 1, and that on said 9th day of March, 1943 this Court entered an Order granting Petitioner the immediate possession of the land in said Parcel No. 1.

That the matters hereinabove alleged are apparent from instruments on file in this cause, and said record is here now referred to in substantiation of said allegations.

II.

That, pursuant to the Order of the Court hereinabove mentioned, Petitioner, within ten days after said Order,

entered upon, took possession of and laid a pipe line over and across the land herein designated as Parcel No. 1.

The facts alleged in this paragraph are substantiated by Affidavit of one M. L. Lee, attached to a Motion filed herein by Petitioner on October 6, 1949, praying for an Order setting aside the Commissioners' award, which Affidavit is here referred to and made a part hereof.

III.

On November 2, 1948, the Commissioners appointed by this Court held a hearing for the purpose of determining the compensation and damages due by the United States of America for the taking of said Parcel No. 1, and on November 16, 1948, said Commissioners filed in this Court their written report, awarding the sum of Four Thousand, Four Hundred Fifty Dollars ($4,450.00) as compensation for the taking of said Parcel No. 1, copy of which report is attached to the Motion filed by Petitioner on October 6, 1949, which copy of said report is here referred to and made a part hereof.

The facts set out in this paragraph are matters of record in this cause, and such record is referred to in the substantiation thereof.

52

IV.

That the Defendant, C. M. Dow, pursuant to Notice served on him and his attorney, appeared at said Commissioners' hearing and offered evidence as to the value of said Parcel No. 1; that no other person or their attorneys appeared at such hearing and that no other persons or concerns were served with notice of such hearing; and the Attorney representing the United States of America at such hearing was then under the impression that there were no parties other than the said C. M. Dow who were entitled to the compensation and damages for the taking of said Parcel No. 1.

That the facts hereinabove alleged are verified by the Affidavit of Scott W. Key, an Assistant to the United States Attorney, which Affidavit it attached to the above mentioned Motion filed by the United States of America

on October 6, 1949, and is here referred to and made a part hereof.

V.

That on November 18, 1948, the United States of America duly filed its objections to the award of the Commissioners, copy of which objections is hereto attached, marked Exhibit 1, and made a part hereof.

VI.

That thereafter, the Motion filed by Petitioner on October 6, 1949, for an Order setting aside the award of the Commissioners, came on for hearing before the Honorable T. M. Kennerly, United States District Judge, but said Judge at the request of the Attorney for C. M. Dow, made no ruling thereon and stated that said Motion
53 would be carried in suspense on the Motion Docket to be acted on in the future.

The facts alleged in this paragraph are verified by the Affidavit of Scott W. Key hereto attached, marked Exhibit 2, and made a part hereof.

VII.

That the Defendant, C. M. Dow, did not have or own any right, title or interest in the land embraced in said Parcel No. 1 on March 9, 1943, the date on which Plaintiff acquired possession of said land but; by Deed dated November 1, 1945, there was conveyed to the said C. M. Dow a tract of land containing 617.289 acres in the John R. Harris Survey in Harris County, Texas, said Parcel No. 1 being an easement laid across said larger tract of 617.289 acres; that said land was conveyed to the said C. M. Dow on the above mentioned date by the heirs and devisees of J. F. Garrett and James Bute, deceased, and a copy of such conveyance is attached to the Motion filed herein by Petitioner on November 6, 1949, and the same is here referred to and made a part hereof.

Petitioner respectfully alleges that by reason of the facts hereinabove alleged, the Defendant, C. M. Dow, had no right, title or interest in Parcel No. 1 on March 9, 1943,

the date on which Petitioner took possession of said land; and, therefore, said C. M. Dow is not entitled to any compensation or damages for the taking of said Parcel No. 1 and is not a necessary party to this proceeding.

WHEREFORE, Petitioner moves the Court for the entry of a Summary Judgment, dismissing the said C. M. Dow as a Party Defendant in this cause. In connection
54 therewith, the Petitioner further moves for the resubmission of its Motion filed herein on October 6, 1949, praying for an Order, setting aside the award of the Commissioners.

Respectfully submitted,

UNITED STATES OF AMERICA

By SCOTT W. KEY
Assistant United States
Attorney

NOTICE

NOTICE is hereby given that Petitioner, United States of America, moves the submission of the above and foregoing Motion to the Court on Monday, May 23, 1955.

It is hereby certified that a copy of the above and foregoing Motion and of this Notice was mailed to John H. Crooker, Jr., Attorney of Record for the Defendant, C. M. Dow, on this the 10th day of May, 1955.

SCOTT W. KEY
Assistant United States Attorney

A TRUE COPY I CERTIFY

ATTEST: V. BAILEY THOMAS, CLERK

ADDENDA

By: Lois Wiech, Deputy

FILED: the 6th day of May, 1955.

Petitioner does not deem it necessary to file a brief in support of this Motion, but in support of the same, does

hereby adopt the brief filed by Petitioner on October 6, 1949, in support of Petitioner's Motion filed on said date.

SCOTT W. KEY
Assistant United States Attorney
Filed 11-16-48

55 **Exhibit "1" to Motion**

Houston, Texas
November 8th, 1948

Hon. Brian S. Odem
U. S. District Attorney
Houston, Texas

Attention Mr. Scott W. Key
Land Department
Re: Civil Action No. 955
Milby Dow Tract
618 Acres. 2.7139 Acres.
Parcel No. 1

Dear Sir:

The undersigned Commissioners having inspected the land involved in the above captioned case, following the Commissioners Court Hearing on November 2nd, 1948, respectfully submit the following award to the land owner, to wit:

FOUR THOUSAND FOUR HUNDRED & FIFTY
Dollars ($4,450.00)

As compensation for land taken, including all damages.

Respectfully,

D. BARKER
D. Barker

THOS. H. GUTHRIE
Thos. H. Guthrie

A. D. FOREMAN
A. D. Foreman
U. S. Commissioners

56 **Exhibit "2" to Motion**

FILED:

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared SCOTT W. KEY, who, being by me duly sworn, on his oath deposes and says:

That Affiant, as Assistant United States Attorney, prepared a Motion in Civil Action No. 955, praying for an Order setting aside the award of the Commissioners made in said proceeding as to Tract No. 1; that said Motion was filed on October 6, 1949, and thereafter came on for hearing before the Honorable T. M. Kennerly, United States District Judge; that the Defendant, C. M. Dow, by his attorney appeared at such hearing without filing any opposition to said Motion and requested the Court to withhold ruling on the same in order that he might secure the intervention of the other parties in the proceedings; that the said Judge granted such request and made no ruling on the Motion but stated that the same would be carried in suspense on the Motion Docket subject to be re-submitted sometime in the future.

SCOTT W. KEY

SUBSCRIBED AND SWORN TO by SCOTT W. KEY, before me the undersigned authority on this the 6th day of May, 1955.

/s/ CAROLINE L. GRAHAM
Notary Public in and for Harris County, Texas
Caroline L. Graham

(Seal)

57 IN UNITED STATES DISTRICT COURT

Motion of Houston Bank & Trust Company, Trustee, et al., to Withdrawal Waiver and to Claim Proceeds of Condemnation Award—Filed, March 5, 1956

NOW COME, Houston Bank & Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B.

Nickle and husband, Donald C. Nickle, Bank of the Southwest National Association (Formerly The Second National Bank of Houston, successor to Guardian Trust Company) Executor and Trustee under the will of Alevia Bute Hill, deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute, and Mrs. Lois Bute Porter and husband, Randon Porter, Jr., said parties being defendants herein and having been served with notice of condemnation herein, and respectfully show the Court:

THAT heretofore on June 24, 1955 they filed in this cause and appearance for all purposes and designated the property in which they are interested to be as follows:

PARCEL I

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line
58 length of 3582.3′ and being out of that certain 616 acres of land more or less, in the John R. Harris Survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377 and 378 Deed Records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

"Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a subdivision of 256.77 acres of land in the southwest corner of the John R. Harris Survey, recorded in Volume 7, page 24, of the Map Records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

"Thence north 0 degrees 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

"Thence south 76 degrees 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line

being also the west line of the Meadowbrook Development Company land; 60

"Thence north 0 degrees 55 min, east along said east line 33.9′ to a point distant south 0 degrees 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

59 Thence north 76 degrees 05 min. west 3581.1′;

"Thence north 83 degrees 0 min. west 1.3′ to a point in the west line of said 616 acres;

"Thence south 0 degrees 30 min. west 33.8′ to the point of beginning."

IN said notice of appearance these Defendants alleged that by deed dated November 1, 1955 they conveyed to C. M. Dow 617.289 acres of land, more or less, in the John R. Harris Survey, Abstract No. 27, in Harris County, Texas, and being the tract of land out of which the above described Parcel No. 1 has been taken, and in said appearance these Defendants further suggested and requested that the award to be made for the taking by condemnation of the said Parcel No. 1 be paid to the Defendant, C. M. Dow.

THESE Defendants now desire to withdraw said request and motion for the payment of such condemnation award to C. M. Dow and ask leave of the Court to withdraw such notice of appearance and waiver of their claim for compensation herein and now assert their right to an interest in the compensation to be awarded in connection with such condemnation.

WHEREFORE, these Defendants move the Court for leave to withdraw their notice of appearance and waiver of right to compensation herein filed by them in this cause on June 24, 1955 and that the compensation to be paid by the United States of America for the taking of said

Parcel No. 1 be paid to them as owners of the land at the time of taking on the 9th day of March, 1943.

Respectfully submitted

FRANKLIN, KELLY & GRAHAM

By /s/ EDWARD A. KELLY
Edward A. Kelly

Attorneys for Defendants, Houston Bank & Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, Bank of the Southwest National Association (formerly The Second National Bank of Houston, successor to Guardian Trust Company) Executor and Trustee under the will of Alevia Bute Hill, deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute, and Mrs. Lois Bute Porter and husband, Randon Porter, Jr.

61 CERTIFICATE OF SERVICE

I, E. A. KELLY, certify that copies of the foregoing motion have been served by me by mailing such copies by United States mail this 5th day of March, 1956 as follows:

To - Mr. Scott W. Key, Assistant United States Attorney for the United States of America,
Postoffice Building,
Houston 2, Texas

To - Mr. L. Keith Simmer,
c/o Fulbright, Crooker, Freeman, Bates & Jaworski,
Attorneys for C. M. Dow
South Coast Life Building
Houston, Texas

To - Mr. Edgar E. Townes, Jr.
c/o Townes & Townes
Attorneys for Memorial Hospital
477 San Jacinto Building
Houston 2, Texas

/s/ E. A. KELLY
E. A. Kelly

IN UNITED STATES DISTRICT COURT

Summary Judgment Dismissing C. M. Dow as a Party Defendant—Filed, March 29, 1956

On this the————day of————, 1956, there came on for consideration the motion filed herein by plain-
62 tiff, United States of America, praying for a summary judgment dismissing C. M. Dow as a party defendant in this cause. Upon consideration of said motion the Court is of the opinion that said motion for summary judgment is good and should be granted.

In this connection, from a consideration of the pleadings of all parties and the affidavits submitted in support of said motion, the Court finds the following facts to be without dispute:

1. This action was commenced on March 9, 1943, by the United States of America against James Bute, et al, for the purpose of condemning pipe line right-of-way easements across certain tracts of land in Harris County, Texas; that Parcel No. 1 in said condemnation is an easement 33 feet in width and 3582.03 feet in length, being a total of 2.7139 acres, over and across a tract of 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, in Harris County, Texas; on March 9, 1943, said 617.289 acres of land belonged to the Estate and heirs of John F. Garrott, deceased, and the Estate and heirs of James Bute, deceased.

2. Before service of citation and before return date, and on March 9, 1943, an ex parte order of the District Court was entered providing in part as follows as to said Parcel No. 1:

> "It is hereby ordered and directed that leave be, and it is hereby granted the United States of America to take immediate possession of said land * * * to the extent of the interest to be acquired by the United States of America."

63 Within ten (10) days after the entry of such order of possession, the United States of America, or the pipe line contractor acting for the United States of America, commenced laying a pipe line over and across said Parcel No. 1. That said pipe line was completed and has been constantly used since said time for the transportation of oil or gas.

3. On November 1, 1945, a deed to 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, Harris County, Texas, said deed being executed by Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the Will and the Estate of John F. Garrott, Deceased, Bertha B. Day, Dorothy Elizabeth Franklin, Agnes B. Nickle, joined by her husband, Donald C. Nickle, James Bute III, John Bute, Mary Elizabeth Nemeth, joined by her husband, Theodore J. Nemeth, Lois Bute Porter and Randon Porter, Jr., by Lois Bute Porter, his agent and attorney-in-fact; Guardian Trust Company (thereafter succeeded by Second National

Bank of Houston), in its capacity as Executor and Trustee under the Will and of the Estate of Alevia Bute Hill, Deceased, was delivered to defendant C. M. Dow. The individual signers were all of the heirs of James Bute, deceased. Houston Bank & Trust Company, as Independent Executor of the Estate and Trustee under the will of John F. Garrott, Deceased, had full power and authority to sell and convey said land. Guardian Trust Company, in its capacity as Executor and Trustee under the Will and of the Estate of Alevia Bute Hill, Deceased, had full power and authority to sell and convey said land.

4. The deed to defendant, C. M. Dow, dated November 1, 1945, covered the full 617.289 acres of land and provided:

64 "It is expressly agreed that this deed is executed by Grantors and accepted by Grantee is being subject to the existence of the following easements and proceedings:

* * * (d) Condemnation proceedings filed by the United States of America v. James Bute, et al, Civil Action No. 955 in the District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. * * *"

A copy of such deed is hereto attached and marked Exhibit "A".

5. On May 31, 1946, the United States of America filed its declaration of taking of the lands involved in this proceeding, including the said Parcel No. 1, and deposited the sum of $1151.30 in the Registry of the Court as the estimated compensation for the taking of said Parcel No. 1.

6. On November 2, 1948, Commissioners appointed by the Court held a hearing for the purpose of determining the compensation and damages due from the United States of America for the taking of said Parcel No. 1, at which hearing defendant, C. M. Dow, appeared and offered evidence as to the value of said Parcel No. 1. On November 16, 1948, such Commissioners filed their report awarding the sum of Four Thousand Four Hundred Fifty Dollars

($4,450.00) as compensation for the taking of Parcel No. 1, labeled by said Commissioners "Milby Dow Tract".

7. Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, Deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, The Second National
65 Bank of Houston, successor to Guardian Trust Company, Executor and Trustee under the Will of Alevia Bute Hill, Deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute and Mrs. Lois Bute Porter and husband, Randon Porter, Jr., appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same.

CONCLUSIONS OF LAW

1. The Court expressly determines that there is no just reason for delay in rendering final judgment as to the claim of defendant, C. M. Dow, to Parcel No. 1 in this proceeding and, accordingly, the Court expressly directs the entry of final judgment dismissing C. M. Dow. That the above and foregoing determination and direction are made under the provisions of Federal Rule 54(b) and for the express purpose of making this judgment final and appealable, as provided in said Federal Rule.

2. That the deed dated November 1, 1945, to C. M. Dow, is a prohibited assignment of a claim against the United States of America and said deed is ineffective to convey to defendant, C. M. Dow, the compensation due from the United States of America for the taking of said Parcel No. 1.

3. That defendant, C. M. Dow, has no enforceable claim to the said Parcel No. 1 or to the compensation to be awarded in the final judgment in this proceeding and, accordingly, said defendant should be dismissed.

It is, accordingly, ORDERED, ADJUDGED and DECREED by the Court that the said C. M. Dow shall
66 be, and he is hereby, dismissed from this proceeding as a party defendant and his claim to the compensation for the taking of Parcel No. 1 is refused and disallowed.

ORDERED at Houston, Texas, on this the 29th day of March, 1956.

/s/ Ben C. Connally
United States District Judge

APPROVED AS TO FORM:

Fulbright, Crooker, Freeman, Bates & Jaworski
By L. Keith Simmer
L. Keith Simmer
Attorneys for Defendant, C. M. Dow.

Scott W. Key
Scott Key, Assistant U. S. Attorney

Franklin, Kelly & Graham
By Edward A. Kelly
Edward A. Kelly

Attorneys for Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, Dec'd, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, The Second National Bank of Houston, successor to Guardian Trust Company, Executor and Trustee under the Will of Alevia Bute Hill, Dec'd, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute and Mrs. Lois Bute Porter and husband, Randon Porter, Jr.

Townes & Townes
By Edgar Townes, Jr.
Edgar Townes, Jr.
Attorneys for Defendant, Memorial Hospital.

67 **Exhibit "A" to Summary Judgment**

THE STATE OF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS: That we, Houston Bank & Trust Company (formerly Houston Land & Trust Company) a corporation of Houston, Harris County, Texas, as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Day, a feme sole, of McHenry County, Illinois; Dorothy Elizabeth Franklin, a feme sole, of Harris County, Texas; Agnes B. Nickle, Joined pro forma by my husband, Donald C. Nickle, of Toronto Canada; Guardian Trust Company, a corporation of Houston, Harris County, Texas, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute, III, of Harris County, Texas; Mary Elizabeth Nemeth joined pro forma by my husband, Theodore J. Nemeth, of New York City, New York; John Bute of Harris County, Texas; and Lois Bute Porter, joined pro forma by my husband, Randon Porter, Jr., the said Randon Porter, Jr., acting herein by and through his duly authorized agent and attorney in fact, Lois Bute Porter, of Harris County, Texas, all jointly hereinafter referred to as "Grantors", for and in consideration of the sum of Two Hundred and One Thousand One Hundred Eighteen & 77/100 Dollars ($201,118.77) cash to us in hand paid by C. M. Dow, the receipt and sufficiency whereof is hereby acknowledged by Grantors; have Granted, Bargained, Sold, and Conveyed, and by these presents do Grant, Bargain, Sell, and Convey, unto the said C. M. Dow, of Houston, Harris County, Texas, and herein at times referred to as "Grantee", the following described real estate and property situated in and
68 being a portion of the Jno. R. Harris Survey in the County of Harris and State of Texas, to wit:

FIRST TRACT: 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, and being a portion of lands now or formerly owned by J. F. Garrott Estate and James Bute Estate, more particularly described as follows

BEGINNING at a point in the most northerly northeast corner of a tract of land now or formerly of E. N. Drouet and the most westerly northwest corner of a 400.0 acre, more or less, tract formerly known as the Mrs. R. J. Allen Tract; said point being a point in the center line of the old channel of Sims Bayou;

Running THENCE South, along an eastern line of said E. N. Drouet Tract, at 15.0 feet pass a 3/4 inch iron pipe on the southern bank of the said old channel of Sims Bayou; in all 105.0 feet to a re-entrant corner of said E. N. Drouet Tract, and a southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less acre tract;

THENCE East, along northerly line of said E. N. Drouet Tract and a southerly line of said Mrs. R. J. Allen 400.0, more or less, acre tract, at 296.0 feet pass a northeasterly fence corner; in all 445.0 feet to a 3/4 inch iron pipe set in the roots of the two 10-inch elms growing together on the west bank of a gully; said pipe marking the most easterly northeast corner of the said E. N. Drouet Tract and re-entrant corner to the said Mrs. R. J. Allen 400.0, more or less, acre tract.

THENCE S. 00 deg. 05 min. E., along the westerly line of the said Mrs. R. J. Allen 400.0, more or less, acre
69 tract, at 165.4 feet pass a northeasterly fence corner and continuing from

THENCE, along an old fence and at 2889.4 feet across the center line of the Houston Lighting & Power Company's Highline, at 5122.4 feet pass the southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less, acre tract, and the northwesterly corner of a 112.0, more or less, acre tract in the name of Mrs. J. Stubbs; in all 6531.4 feet to a 3/4 inch pipe set in dividing line between the Jno. R. Harris Survey and the D.W.C. Harris Survey, as fenced; said point marking the southwesterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract;

THENCE East, along said dividing line of the Jno. R. Harris and the D.W.C. Harris Surveys, as fenced, and along the southerly line of said Mrs. J. Stubbs 112.0, more or less, acre tract, and the northerly line of the Municipal Airport, as fenced and generally recognized, 3484.2 feet

to 3/4 inch pipe marking the southeasterly corner of the said Mrs. J. Stubbs Tract and the southwesterly corner of a tract of land subdivided and known as Meadowbrook acres, as fenced;

THENCE N. 00 deg. 10 min. E. Along the easterly line of the said Mrs. J. Stubbs 112.0, more or less, acre tract and the westerly line of said Meadowbrook Acres, at 1409.0 feet pass the northeasterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract, and the southeasterly corner of a 117.0, more or less, acre tract, formerly in the name of C. D. Allen, and continuing

THENCE, along the easterly line of said C. D. Allen 117.0 more or less, acre tract, and the westerly line of said Meadowbrook Acres Subdivision, as fenced and generally recognized, at 4227.0 feet cross the center line of the said Houston Lighting & Power Company's Highline; in all 7451.0 feet to the northwesterly corner of said Meadowbrook Acres Subdivision as marked by a 3/4 inch pipe set in the Southwesterly line of a right-of-way of the Galveston-Houston Interurban Railroad Company, as fenced and now abandoned;

THENCE N. 41 deg. 23 min. W., along the South westerly line of said abandoned right of way, at 674.5 feet pass a 3/4 inch pipe; in all 302.5 feet to the center line of the old channel of Sims Bayou;

THENCE, following the center line of the old channel of Sims Bayou as it existed prior to the changing of its course by the Harris County Drainage District, and running in a westerly direction and with all of its meanderings to the place of beginning; containing, as aforesaid, 617.289 acres of land; as surveyed in October, 1945, by A. C. Stimson, C. E., County Surveyor of Harris County, Texas;

TO HAVE AND TO HOLD the above described property and premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said C. M. Dow, his heirs and assigns, forever; and the Grantors do hereby bind themselves, their heirs, successors, executors and administrators in the proportions and subject to the limitations hereinafter set forth, to

warrant and forever defend all and singular said property and premises unto the Grantee, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof; save and except
71 that no warranty, either express or implied, is given by Grantors on or covering the aforesaid Tract 2, being the former right-of-way of Galveston-Houston Electric Railway Company; and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned; and also conditioned that the warranty of Houston Bank & Trust Company as Executor and Trustee of the Estate of John F. Garrott, deceased, and of Guardian Trust Company as Executor and Trustee of the Estate of Alevia Bute Hill, deceased, shall be binding on such estates only to the extent that such estates may be legally bound. The title to the above property and premises is presently vested in Grantors in the following proportions, to wit:

Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, deceased, 1/2 thereof; Bertha B. Day 1/8 thereof; Dorothy Elizabeth Franklin 1/8 thereof; Agnes B. Nickle 1/16 thereof; Guardian Trust Company Executor and Trustee under the Will of Alevia Bute Hill, deceased 1/16 thereof; James Bute III 1/32 thereof; Mary Elizabeth Nemeth 1/32 thereof; John Bute 1/32 thereof; Lois Bute Porter 1/32 thereof; and as a part of the consideration hereof, it is understood and agreed that the liability, if any, of the Grantors herein on any warranty hereunder, shall be several and not joint, and no Grantor shall ever be held on such warranty, should the title to such property fail, except for the proportionate interest of such Grantor in and to said property as hereinabove set forth. It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings:

72 (a) That certain pipe line right-of-way easement dated November 4, 1920, recorded in Vol. 462, page 496 of the Harris County Deed Records from John Bute and R. A. Welsch Trustees of the Estate of James Bute and John F. Garrott and John Bute to S. M. Briscoe;

(b) That certain pipe line right-of-way easement dated October 30, 1920, recorded in Vol. 465, page 9 of the Harris County Deed Records, from John Bute and R. A. Welch, Trustees, of the Estate of James Bute, deceased; and John F. Garrott and John Bute to Gulf Pipe Line Company;

(c) An unrecorded easement for power line given to Houston Light & Power Company to cross the aforesaid property;

(d) Condemnation proceedings filed by the United States of America vs. James Bute et al., Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol 7, page 218, Lis Pendens Record of Harris County, Texas. Taxes against the aforesaid property for the current year of 1945 have been prorated and ajusted between the parties hereto, and under such adjustment such taxes are to be paid by and are assumed by the Grantee.

EXECUTIVE as of the 1st day of November, A.D. 1945.

Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the will and the Estate of John F. Garrott, deceased, and not individually, By O. R. Weyrich, President.

ATTEST: G. A. Holder, Cashier, (SEAL)

73

Bertha B. Day
Dorothy Elizabeth Franklin
Agnes B. Nickle
Donald C. Nickle—pro forma
James Bute III
John Bute
Mary Elizabeth Nemeth
Theodore J. Nemeth—pro forma
Lois Bute Porter
Randon Porter, Jr.,
By Lois Bute Porter His Agent
and Atty-in-fact Guardian Trust Co.,
in its capacity as Executor and Trustee
under the will and of the Estate of Alevia
Bute Hill, deceased, and not individually,
By J. S. Whitworth, Vice-Pres.

ATTEST: Norman Sterling, Asst. Secretary. (SEAL)

IN THE UNITED STATES DISTRICT COURT

Order Setting Aside Award of Commissioners—Filed, April 3, 1956

ON THIS day there came on for consideration the Motion filed herein on October 6, 1949, by Plaintiff, United States of America, praying for an Order of this Court, setting aside the Award of the Commissioners filed herein on November 16, 1948, which Motion was reiterated in Plaintiff's Motion for Summary Judgment, filed herein on
74 May 6, 1955. Upon consideration of the record in this cause, the Court finds that at the time of the Award, made and filed by the Commissioners on November 16, 1948, the Defendant, C. M. Dow was the only party-defendant in this proceeding as to Parcel No. 1; that thereafter, in 1954, several other persons and concerns were made parties-defendant; that said new parties, in effect, filed their Disclaimer and consented that the compensation for the taking of Parcel No. 1 might be paid to the Defendant, C. M. Dow; that on May 6, 1955, Plaintiff United States of America, filed its Motion for Summary Judgment, dismissing C. M. Dow and his claim for compensation; that such Motion has been granted by this Court, and C. M. Dow has been dismissed and is no longer a party to this proceeding, but, the Defendants, Houston Bank & Trust Company, Mrs. Bertha B. Day, Mrs. Agnes B. Nickle, Bank of the Southwest National Association, James Bute III, Mrs. Mary Elizabeth Nemeth, John Bute and Mrs. Lois Bute Porter, have filed their Motion herein to Withdraw their Answer and Disclaimer filed herein on the 24th day of June, 1956, and are now claiming the compensation due for the taking of said Parcel No. 1.

It is accordingly ORDERED by the Court that the Award of the Commissioners as to Parcel No. 1, filed herein while C. M. Dow was the only Defendant in Court as to said Parcel, shall be and the same is hereby set aside and held for naught.

In open Court, counsel for Plaintiff, United States of America, waived notice of the Motion filed by the Defendants, Houston Bank & Trust Company, et al, to withdraw the Answer and Disclaimer previously filed herein on June

24, 1955, and consented that such Motion might be granted; therefore, it is accordingly ORDERED by the Court that the said Defendants may withdraw their said Answer and Disclaimer, filed by them on June 24, 1955, and that this cause shall henceforth be prosecuted to conclusion in accord with Rule No. 71-A.

ORDERED at Houston, Texas, on this the 3rd day of April, 1956.

BEN C. CONNALLY
United States District Judge

O.K.
SCOTT W. KEY,
Asst. U. S. Atty.

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal by C. M. Dow—Filed. April 17, 1956

Notice is hereby given that C. M. Dow, defendant in the above entitled and numbered cause, and claimant to Parcel No. 1 in said cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Summary Judgment dismissing C. M. Dow as a party defendant, entered in this action on the 29th day of March, 1956.

Dated at Houston, Texas, this 16th day of April, 1956.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

76 **Cost Bond on Appeal**

(omitted in printing)

* * *

77 IN THE UNITED STATES DISTRICT COURT

Statement of Points on Appeal—Filed, April 17, 1956

Appellant, C. M. Dow, will rely upon the following points on his appeal:

1. The court erred in granting the motion for summary judgment of the United States of America dismissing C. M. Dow's claim to Parcel No. 1 and the award for same and dismissing C. M. Dow as a party defendant.

78 2. The court erred in holding and concluding that the deed to C. M. Dow dated November 1, 1945, covering the lands including said Parcel No. 1, was a prohibited assignment of a claim against the United States of America.

3. The court erred in holding that appellant, C. M. Dow, has no enforceable claim to the said Parcel No. 1 or to the compensation to be awarded for said Parcel No. 1.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

IN THE UNITED STATES DISTRICT COURT

Stipulation for a Supplemental Record—Filed, May 14, 1956

WHEREAS, the Defendant C. M. Dow has heretofore given notice of appeal from a judgment of this Court, dismissing this claim to the compensation to be paid for the taking of Parcel No. 1, and the record on such appeal has heretofore been designated and has been prepared by the Clerk of the Court; and

WHEREAS, through error there was omitted from such record on appeal Defendant C. M. Dow's answer to the

motion of the United States of America for Summary Judgment Dismissing the Claim of said Defendant, filed on or about June 24, 1955.

79 NOW, THEREFORE, it is AGREED by the parties to such appeal that the Clerk of this Court may prepare and transmit a supplemental record, including this Stipulation and the said above mentioned instrument.

UNITED STATES OF AMERICA

By SCOTT W. KEY
Assistant United States Attorney

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
By L. KEITH SIMMER
Attorneys for C. M. Dow.

IN THE UNITED STATES DISTRICT COURT

Defendant C. M. Dow's Answer to Motion for a Summary Judgment Dismissing the Claim of said Defendant—Filed, June 24, 1955

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES C. M. Dow, one of the defendants herein, and files this his answer to the motion for summary judgment dismissing his claim filed herein on or about May 6, 1955, by plaintiff, United States of America, and for such answer would respectfully show unto the Court as follows:

I.

That on or about October 6, 1949, the United States of America filed in this cause a motion to set aside the Commissioner's Award upon the ground that this defendant, C. M. Dow, was not the only person entitled to compensation. It was stated on behalf of the United States of America in said earlier motion that:

80 "The Government is not asking the Court to deny the claim of C. M. Dow or to dismiss him from the proceeding, but * * * it is insisting that the former owners of the land should be made parties to the proceeding * * *."

The 1949 motion to set aside the Award theretofore made, upon hearing, was refused, such refusal being without prejudice to its refiling.

Thereafter by notice of condemnation the United States of America made the former owners of Parcel No. 1 parties to this proceeding; said former owners have appeared by appropriate pleading and urge the Court to pay the award for this land to defendant, C. M. Dow. No conflict of interest between the present owner of the land, C. M. Dow, and the former owners is presented and final judgment of condemnation will carry the full title to the United States of America and such judgment will be binding on the present owner and former owners alike.

II.

Under the circumstances present in this case, as stated above, defendant, C. M. Dow, is a proper and necessary party and is entitled to the award of just compensation for Parcel No. 1. Every interest and concern of the United States of America has been and is being fully protected in this case. When the original hearing before Commissioners was held, C. M. Dow, as purchaser pending condemnation, was entitled to the award and was a proper party to appear and give evidence of the value of Parcel No. 1. He still is a proper party and under settled law is entitled to the award to be made by final judgment herein.

81 Said defendant moves the Court to deny both motions of the United States of America—to dismiss him and to set aside the award—and files and presents along with this answer his brief in opposition to the United States of America's motion in this case.

WHEREFORE, premises considered, defendant, C. M. Dow, prays that the motions of the United States of America to dismiss him from this suit and to set aside the award for Parcel No. 1 be in all things refused and denied and further prays that he be awarded the just compensation

heretofore fixed by the Commissioners together with all legal interest on such award.

L. KEITH SIMMER
L. Keith Simmer, Attorney for Defendant, C. M. Dow
1201 Second National Bank Bldg.
Houston 2, Texas

OF COUNSEL:
Fulbright, Crooker, Freeman,
Bates & Jaworski

CERTIFICATE OF SERVICE

A copy of the foregoing answer has been served on the Hon. Scott W. Key, Assistant United States Attorney for the United States of America, Post Office Building, Houston, 2, Texas, and on Edward A. Kelly of Franklin Kelly & Graham, Cotton Exchange Building, Houston 2, Texas, attorneys for Houston Bank & Trust Company Trustee, et al, by delivering same to their addresses above given on this 24th day of June, A.D., 1955.

L. KEITH SIMMER
L. Keith Simmer

82 **Clerk's Certificate to Foregoing Transcript**

(omitted in printing)

* * *

83 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Argument and Submission—Filed, Nov. 13, 1956

(omitted in printing)

* * *

84 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16125

C. M. Dow, *Appellant*,

VERSUS

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

Opinion—Filed, December 11, 1956

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a summary judgment dismissing C. M. Dow as a party defendant in a condemnation proceeding which, in accordance with Rule 54(b), F.R.C.P., was entered as a final and appealable judgment.

85 The United States commenced proceedings to condemn an easement for a pipe line right of way on March 9, 1943, and shortly thereafter went into possession of the easement pursuant to an order obtained under the Second War Powers Act of 1942, 56 Stat. 177.[1] More than two years thereafter, on November 1, 1945, Dow acquired by deed, made subject to the condemnation proceedings, 617.289 acres of land which included 2.7139 acres within the right of way. Seven months thereafter, on May 31, 1946, the Government filed a declaration of taking and deposited estimated compensation for the taking of Parcel No. 1, the particular 2.7139 acres.[2]

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[1] "* * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * *.

"Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of this Act, notwithstanding any other law."

[2] Pursuant to 40 U.S.C.A. 258(a), providing in pertinent part as follows:

"In any proceeding * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described

86 Commissioners appointed by the Court under the Texas practice held a hearing at which Dow appeared and offered evidence as to value. The Commissioners' report awarded $4,500.00 as compensation for the taking of Parcel No. 1. Dow's vendors, or their heirs or representatives, were not served with notice, and did not appear at the compensation hearing. After the report, however, the Government's attorney reached the conclusion that Dow was not entitled to compensation for the taking of Parcel No. 1, and moved to set aside the award alleging that the parties entitled to compensation were neither served nor present at the commissioners' hearing; and moved also for a summary judgment dismissing Dow's claim on the ground that his deed was a prohibited assignment of a claim against the Government.[3]

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in the petition, declaring that said lands are thereby taken for the use of the United States. * * *.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein * * *.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

[3] Under the Anti-Assignment Act, 31 U.S.C.A. 203, providing in pertinent part as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *."

Answering said motion, Dow reiterated his claim. Notwithstanding the fact that his vendors appeared and filed a waiver to any compensation due from the Government and requested that the award be paid to Dow,[4] the motion for summary judgment dismissing Dow was granted and this appeal followed.

87

The sole question for decision is whether the act prohibiting assignment of claims against the United States bars Dow's claim to compensation, he having purchased after possession had been awarded in the proceedings but prior to the filing of a declaration of taking. Under the explicit provisions of the Anti-Assignment Statute, a claim to compensation for a taking of property cannot be voluntarily transferred after it has arisen.[5] Otherwise stated then, the question is whether the taking occurred and the claim arose when the United States went into possession of the easement pursuant to the order of possession,[6] or subsequently upon the filing of the declaration of taking and of the deposit in the court.[7]

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[4] By leave of the court, requested just before and granted after Dow had been dismissed, this appearance and disclaimer were withdrawn. The findings of fact accompanying Dow's dismissal recited that his vendors "appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same."

[5] See, e.g., United States v. Shannon, 342 U.S. 288; 23 Tracts of Land v. United States, 177 F. 2d 967, (6th Cir.).

[6] Providing in part:

"Leave * * * is hereby granted the United States of America to take immediate possession of said land * * * *to the extent of the interest to be acquired by the United States of America* * * *," (Emphasis supplied.)

[7] The judgment entered thereon provided:

"It is therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said Declaration of Taking, and the depositing in the Registry of this Court of the sum of $3801.30, a perpetual right of way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of a pipe line * * * vested in the United States of America * * * and said lands are deemed to have been condemned and taken for the use of the United States of America, *and the rights to just compensation for the property taken, upon the filing of said Declaration of Taking and making of said deposit, vested in the persons entitled thereto* * * *." (Emphasis supplied.)

88 The Government insists that when it took possession there was a taking of the property, and that thereupon the claim to compensation arose. Concededly, however, the United States was free to abandon the condemenation at any time before filing its declaration of taking.[8] In such an event, the United States would have become liable for actual use and occupancy with restoration damage.[9] Such liability did not actually accrue. Instead, upon the filing of the declaration of taking the United States became irrevocably committed to the payment of the ultimate award.[10] The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow. Theretofore the taking was not complete. Cf. *United States v. Dickinson*, 331 U.S. 745, 749.

The Declaration of Taking Act fixed a definite time of taking and of accrual of the claim for compensation and removed much of the uncertainty theretofore existing.[11] Nothing herein said is inconsistent with, or is meant to change, the equitable rule that where the declara-
89 tion of taking is filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the date possession was acquired.[12]

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[8] O'Connor v. United States, 9th Cir., 155 F. 2d. 425; Moody v. Wickard, D.C. Cir., 136 F. 2d 801; United States v. One Parcel of Land, D.C. Cir., 131 F.Supp. 443.

"Until taking, the condemnor may discontinue or abandon his effort." Danforth v. United States, 308 U.S. 271, at p. 284.

[9] Cherokee Nation v. South Kansas Ry., 135 U.S. 641, 660, and authorities cited in Footnote 7, supra.

[10] 40 U.S.C.A. 258(e); Catlin v. United States, 324 U.S. 229, 241, 242.

[11] See Danforth v. United States, 308 U.S. 270, 283-284; United States v. 8677 Acre of Land in Richland County, 42 F.Supp. 91; United States v. 40,379 Square Feet of Land, 58 F.Supp. 246; 6 Nichols, "Eminent Domain", § 27.25, p. 321.

[12] 11,000 Acres of Land, etc. v. United States, 5th Cir., 1952 F. 2d. 566; Anderson v. United States, 5th Cir., 179 F. 2d. 281.

90 IN UNITED STATES COURT OF APPEALS

No. 16125

C. M. Dow,

VERSUS

United States of America.

Judgment—Filed, Dec. 11, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

* * * * * *

91 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

Petition of the Appellee for Rehearing and Request That Such Hearing be Had En Banc—Filed, Dec. 28, 1956

Comes now the United States, appellee in the above-entitled cause, and presents this petition for rehearing and requests that such hearing be had *en banc*, and in support thereof respectfully shows:

1. *The holding of this Court that it was only upon the passage of title to the United States that a "claim for compensation arose and vested in the owner" is clearly erroneous.*—Title to an interest in property acquired by the United States in exercise of its power of eminent domain *never* passes until payment. When the power is exercised, as it may be, by physical seizure of the property and execution of the government purpose leaving the landowner to his suit under the Tucker Act that
92 transfer of title occurs only when the United States

pays the judgment.[1] In ordinary condemnation proceedings title likewise does not pass until the United States pays the judgment determining compensation. In only one instance does title ever pass prior to complete payment. That occurs when the acquiring agency chooses to exercise the authority granted by the Declaration of Taking Act. When that ancillary procedure is invoked by the making of part payment, a defeasible title passes to the United States. Since the title is defeasible, this procedure is no exception to the principle that "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation." *Hanson Co.* v. *United States*, 261 U. S. 581, 587 (1923). This authority of federal agents, as contrasted with the officers of many states, rests upon the fact that "When land is taken for public use, the Fifth Amendment requires that just compensation be paid to the owner, but it does not, as some State constitutions do, direct that payment to be 'first' made in advance of the taking." *Garrow* v. *United States*, 131 F. 2d 724, 726 (C. A. 5, 1942), certiorari denied, 318 U. S. 765.

"Taking" in Tucker Act cases necessarily means physical entry upon property in physical deprivation of the owner's right to use it and not taking of title. Other-
93 wise a plaintiff could never show a right to compensation because it would only arise on entry of judgment. The distinction between a taking and a transfer of title was made clear long ago in *United States* v. *Lynah*, 188 U. S. 445, 470-471 (1903):

> It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the

[1] Of course, in cases where recovery would otherwise be permitted under the Tucker Act, the failure of the claimant to bring his case within the six year period of limitation has the same effect as payment.

fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner.[2]

The most important consequences of taking are threefold. From that date the Government is obligated to pay compensation. If that payment is delayed a remedy must be accorded to the owners, usually represented by interest. The date of taking fixes the date of valuation. And the date of taking is the date when the claim for compensation arises and, consequently, the right in the owner to sue under the Tucker Act, if a remedy is not available to him in a pending condemnation proceeding, then accrues. These principles equally apply whether the taking is a result of a court order authorizing a taking of possession[3] or is without court order.

94

The fact that unfil title has vested the United States may change its intention to take the property permanently, abandon the permanent fee taking proceeding and compensate the owner simply for what it has taken does not change the fact that there has been a taking. It merely mean sthat the extent of that taking may not be absolutely fixed until title passes. Similarly, when the taking is not accompanied by condemnation proceedings, the extent of the taking may be a matter for litigation and findings under the Tucker Act. *United States* v. *Causby*, 328 U. S. 256

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[2] An earlier expression of the same view is *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181 (1871), where the court said:

> But we are of the opinion that * * * where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution * * *.

[3] There are various statutes authorizing entry of such orders of possession and the authority exists absent any statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C. A. 8, 1931).

(1945). Every case holding that there has been a taking prior to passage of title is an implicit recognition of this fact.

In short, all of the federal appellate decisions have recognized that a taking occurs when possession of the property is taken or the owner is physically excluded from it in whole or part. No appellate decision to our
95 knowledge has heretofore held that despite physical possession, a taking did not occur until a later filing of a declaration of taking.[4] Nor has it been heretofore suggested that date of valuation does not accord with the date of taking.

2. *The holding is in conflict with decisions of this and other federal courts of appeal.*—The Court of Appeals for the Sixth Circuit has held the exact opposite of this present decision for purposes of determining when the right to compensation arises within the meaning of the Anti-Assignment of Claims Act. *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6, 1949).

This Court, in at least three cases, has held that a taking occurs upon entry into possession by the United States, rather than upon the later filing of a declaration of taking, for purposes not only of determining the date of valuation but also for determining the date from which interest arising because of delay in payment commences. *United States* v. *Vilbig*, 208 F. 2d 663 (C. A. 5, 1953); *Anderson* v. *United States*, 179 F. 2d 281 (C. A. 5, 1950), certiorari denied, 339 U. S. 965; *11,000 Acres of Land, Etc.* v. *United States*; 152 F. 2d 566 (C. A. 5, 1945), certiorari denied, 328 U. S. 835, and cases there cited. The same result has been reached by other courts of appeal. *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10, 1947); *Bank of Edenton* v. *United*
96 *States*, 152 F. 2d 251 (C. A. 4, 1945); *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351 (C. A. 2, 1945). None of these cases suggest either (a) a difference in rules depending whether the issue as to date of taking

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[4] *Danforth* v. *United States*, 308 U. S. 271 (1939), clearly does not do so. Instead, recognizing all of the principles we have stated, it held that there had been no physical invasion or interference with the owner's use of his property. It said there was no taking "in actuality."

arises in Tucker Act proceedings or in a condemnation case,[5] or (b) a different date of taking for determining when the claim to compensation arises, who is entitled to be paid compensation, or who is entitled to interest or other payment because compensation was not paid when due.

3. *The issue is so important as to require consideration by the full bench of this Court.*—We realize that the mere fact that a decision is erroneous and is in conflict with previous decisions of this Court is not adequate grounds for re-examination by the full bench of this Court. However, we believe, for reasons now to be stated that a full bench hearing is called for here.

Landowners' rights would be seriously affected. The decision would deprive them of any claim for interest or other compensation for delay in payment, even though the United States has taken possession, until such time as the Government chooses to file a declaration of taking or, if it does not do so, until final judgment. This is a necessary result of the conclusion that the claim for compensation only arises when title passes. In view of the continuous volume of federal condemnation proceedings and the inevitable delays before final judgment is entered or
97 a declaration of taking filed, the importance of such deprivation to landowners is obvious.

The landowner's ability to transfer the property is seriously impaired by this decision. The taking of easements rather than complete title is very frequent today notably for flowage purposes and for airfield purposes. The decision means that the owner of property where possession of the easement has been taken must, in order to sell his property at its real value, persuade his vendee to buy a lawsuit. The impediments thrown upon the marketability of property need not be elaborated.

The decision also creates practical difficulties for the condemnor. Heretofore it had been believed sufficient to extend title searches simply to the date of taking possession and to conduct settlement negotiations with the owner of

[5] Indeed this Court in the *11,000 Acres* case relied primarily upon Tucker Act decisions.

the property at that date. The necessity of constant extension of title searches is especially burdensome as applied to easements and rights-of-way like the one here concerned for a pipeline which requires dealing with the owners of many tracts of land each of whom will have a claim of only a relatively small amount. For example, Dow's claim relates to 2.7 acres out of a 617-acre farm. Governmental processing of such projects will become inordinately expensive.

Beyond these immediate effects the decision creates confusion and doubt as to one of the fundamentals in exercise of the federal power of eminent domain. It extends beyond the various aspects in which date of taking is important in condemnation proceedings and raises the
98 question whether a Tucker Act suit may be maintained at all.

We submit that these matters are so important to the conduct of condemnation proceedings that they should be resolved by all of the judges of this Court.

CONCLUSION

Wherefore, for the foregoing reasons, appellee submits that a rehearing should be granted and requests that such rehearing be *en banc*.

Respectfully submitted.

/s/ PERRY W. MORTON
Perry W. Morton,
Assistant Attorney General,

/s/ ROGER P. MARQUIS
Roger P. Marquis,

RICHARD C. PEET,
Attorneys,
Department of Justice,
Washington, D. C.

DECEMBER 1956.

CERTIFICATE OF COUNSEL

I, Roger P. Marquis, counsel for appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

/s/ Roger P. Marquis
Roger P. Marquis

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of two copies of the Petition of the Appellee for Rehearing *en banc* in the above-entitled case.

/s/ L. Keith Simmer
L. Keith Simmer

December 28, 1956
DATE

99 — IN UNITED STATES DISTRICT COURT

[Title omitted]

Order Denying Rehearing—Filed Jan. 3, 1957

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

100 CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT

(omitted in printing)

* * * * *

101 SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari—

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including—
April 19th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 1st
day of April, 1957.

102 SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Allowing Certiorari—Filed, May 27, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
APR 11 1957
JOHN T. FEY, Clerk

102

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

C. M. DOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

UNITED STATES OF AMERICA, *Petitioner*

v.

C. M. DOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 11, 1956.

OPINION BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Appendix A, *infra*, p. 23-28) is reported at 238 F. 2d 898. A petition for rehearing *en banc* was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 28) was entered December 11, 1956. A petition for rehearing *en banc* was denied on January 3, 1957. By order of Mr. Justice Black, dated April 1, 1957, the time for filing a petition for certiorari was extended to and including April 19, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in proceedings by the Government to condemn an easement, a claim to compensation "arose and vested" in a landowner at the time of the entry into possession by the United States in 1943 or only, subsequently, upon the filing of a declaration of taking in 1946.

STATUTES INVOLVED

The relevant portions of the Second War Powers Act of March 27, 1942, 56 Stat. 177, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), and the Anti-Assignment Act, 31 U.S.C. 203, are set out in Appendix B, *infra*, pp. 28-32.

STATEMENT

On March 9, 1943, the United States commenced proceedings to condemn an easement for a pipe-line right-of-way over certain lands in Harris County, Texas, under the provisions of Title II of the Second War Powers Act of 1942 (R. 5). An Order for Immediate Possession was granted on the same date (R. 36), and the Government went into possession soon thereafter. The pipe-line was constructed and has been in continuous use since that time (R. 63).

In November 1945, respondent C. M. Dow acquired by deed 617.289 acres of land (R. 40, 67), embracing 2.7139 acres within the condemned right-of-way. Dow's conveyance was specifically rendered subject to the existence of the aforementioned condemnation proceedings (R. 46, 72). The conveyance referred to right-of-way easements and the pending proceedings and provided that the deed was executed "as being subject to the existence of the following easements and proceedings." (R. 45). There follows a listing of (a) a pipeline right-of-way easement dated November 1920, (b) a pipeline right-of-way easement granted October 1920, (c) an unrecorded easement for a power line and (d) these condemnation proceedings "as reflected in Lis Pendens Notice recorded * * *" (R. 45-46).

Subsequent to Dow's acquisition of title to the land, in May 1946, the Government filed a Declaration of Taking, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), for the condemned portion, and deposited the estimated compensation into the registry of the court (R. 64). Thereafter, commissioners appointed by the court under the Texas practice held a hearing for the purpose of determining compensation and damages due for the taking of said parcel (R. 64). Dow's vendors, the original condemnees, were deceased. Neither their heirs nor their executors and trustees were served with notice or appeared at the compensation hearing (R. 33). Dow did appear and offer evidence as to value.

The report of the commissioners, awarding $4,500 as compensation for the taking of the condemned parcel, was filed in November 1948. The United States thereafter moved to set aside this award (R. 31), alleging

that the parties entitled to compensation were neither served nor present at the commissioners' hearings (R. 33-35), and that Dow had no right, title or interest to the parcel at the time it was taken by the United States; that his deed was a prohibited assignment of a claim against the Government and, thus, ineffective; and that he was therefore not entitled to compensation for the taking (R. 53). In March 1956, the motion for summary judgment was granted (R. 61), the earlier award of compensation by the commissioners was set aside, and judgment was entered accordingly (R. 73).[1]

The Court of Appeals for the Fifth Circuit reversed. It held that, despite the earlier physical appropriation by the United States in 1943, no claim to compensation "arose and vested" until the filing of a declaration of taking three years later in 1946,[2] and therefore that there was no prohibited assignment of a claim against the United States. 238 F. 2d 898, Appendix A, *infra*, pp. 26-28. The case was remanded for further proceedings consistent with this holding.

REASONS FOR GRANTING THE WRIT

The Court of Appeals agreed with the District Court that under the Anti-Assignment Act (Appendix B, *infra*, p. 32) a claim to compensation for a taking of property cannot be voluntarily transferred after it has

[1] The United States does not claim, of course, that Dow's vendors are not entitled to compensation. If their heirs, executors, or trustees should come into court, on an appropriate motion, they would be entitled to the compensation.

[2] Judge Rives, the author of the opinion below, had expressed the same views earlier; in his dissenting opinion in *Slattery Company, Inc.* v. *United States of America*, 231 F. 2d 37, 50.

arisen (Appendix A, *infra*, p. 26). And, apart from the Anti-Assignment statute, the established eminent domain rule is that it is the owner at the date of taking who is entitled to compensation.[3] The Court of Appeals reversed the trial court, however, on the ground that a taking did not occur and a claim to compensation did not arise when possession was taken in 1943 but only when, more than three years later in 1946, title was acquired by the filing of a declaration of taking under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a), and a deposit made in court of the estimated compensation. A brief review of the basic principles and established procedures relating to the federal power of eminent domain will demonstrate, we believe, not only the error of the decision below but its disruptive effect upon the whole process by which property needed for federal purposes is acquired. The ruling is unjust to many landowners as well as the Government and opens the door for manipulation whereby the amount the Government is required to pay may, without just cause, be substantially increased. In fact, the ruling would not provide for just compensation under the Constitution.

I.

The central significance of the Government's taking-of-possession, as distinguished from the later passage of title, can be seen from the settled principles of federal eminent domain.

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[3] *Danforth* v. *United States*, 308 U.S. 271, states (p. 284): "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment." Cf. *United States* v. *Dickinson*, 331 U.S. 745.

1. The power of eminent domain does not rest upon express constitutional grant but is implied from the necessity of acquiring the property essential to prosecution of the Government's appropriate functions without interference by owners unwilling to part with their property. *Kohl* v. *United States*, 91 U.S. 367, 371-372; *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 527-530. The Fifth Amendment limits the exercise of this power to the extent that it requires the payment of just compensation. However, it does not, as do the constitutions of many states (often referred to as "first pay" jurisdictions), require that compensation be paid in advance, or at the time, of appropriation of the property. *Hurley* v. *Kincaid*, 285 U.S. 95, and cases there collected (p. 104). See also *Garrow* v. *United States*, 131 F. 2d 724 (C.A. 5), certiorari denied, 318 U.S. 765. In the "first pay" jurisdictions, a governmental body which seizes property prior to institution of some proceeding to determine compensation is a trespasser. But when a properly authorized officer of the Federal Government physically occupies property, it is not a tort or trespass but constitutes a taking under the power of eminent domain. The owner is provided an adequate remedy to obtain compensation in the District Court or Court of Claims for such a taking by the Tucker Act (now 28 U.S.C. 1346(a)(2) and 1491) and consequently cannot prevent the taking by injunction nor recover trespass damages against the government officers or agents. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *Yearsley* v. *Ross Constr. Co.*, 309 U.S. 18, 21-23.

The power of eminent domain has been so exercised constantly for more than 80 years by physical acts constituting a seizure of real estate or the assertion of

dominion over it. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181, holding that "where real estate is actually invaded * * * so as to effectually destroy or impair its usefulness, it is a taking * * *." We are not here concerned with the many difficult problems whether particular acts may constitute a taking rather than consequential damage, nor at what point in the course of a continuing process a taking occurs. *United States* v. *Dickinson*, 331 U.S. 745. Under any definition, the acts here involved, which were the physical entry upon real estate, the laying of an oil and gas pipe-line through it, and the continued operation of the line (R. 63), constituted a taking of a servitude or easement for these purposes. During World War I, the Tucker Act form of exercise of the eminent domain power was in substance adopted in Section 10 of the Lever Act, 40 Stat. 276, 279, whereby persons dissatisfied with the amount offered them as compensation for seizure of their property could withdraw 75% of the estimated amount and bring suit in the appropriate District Court to recover just compensation. See, *e.g.*, *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 302.

Another means of exercise of the right of eminent domain is through the institution by the United States of condemnation proceedings. The first exercise of that power by proceedings brought by the United States in a federal court appears to be *Kohl* v. *United States*, 91 U.S. 367. In 1888 and 1890, two general statutes, which are still effective, were enacted, providing authority for the institution of condemnation proceedings whenever government officers are empowered to procure real estate for public uses. Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257; Act of August 18,

1890; 26 Stat. 316, 50 U.S.C. 171. At that time, the procedure in such cases conformed to local law, and this was not changed until Rule 71A, F.R.C.P., became effective in 1951 except for the ancillary procedure established by the Declaration of Taking Act of 1931, discussed later (*infra*, pp. 13-14).

The condemnation proceedings under the 1888 and 1890 Acts (which are now often denominated "ordinary" proceedings) represented a process whereby the price of acquisition might be ascertained before any rights in the land were acquired by the Government. In such cases, the judgment represented, in effect, an offer to the condemnor which it was free to accept or reject. Upon acceptance by payment of the stated amount into court, title to and the right to possession of the interest condemned vested in the Government. See *Danforth* v. *United States*, 308 U.S. 271, 284-285. Such "ordinary" condemnation proceedings are still frequently employed when time is not pressing. However, at least by the time of World War I, the need for expedition resulted in the amendment of the 1890 Act so as to permit the taking of immediate possession of lands as to which proceedings to condemn for military purposes have been instituted. Act of July 2, 1917, 40 Stat. 241, 30 U.S.C. 171. A similar permanent authority for taking immediate possession of lands subject to condemnation is applicable to river and harbor improvements. Act of July 18, 1918, 40 Stat. 911, 33 U.S.C. 594. Various other statutes have authorized the courts to order the taking of immediate possession and such orders have been entered in the absence of statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C.A. 8). During World War II, the Second War Powers Act authorized the

courts to order the immediate taking of possession and this authority, under which possession was taken in the instant case, was widely used. Act of March 27, 1942, 56 Stat. 176 (Appendix B, *infra*, p. 29). But the power to take possession and leave compensation to be determined in Tucker Act proceedings is not waived by the institution of condemnation proceedings; therefore, possession can also be taken at any time without court order. *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324 (C.A. 9).

Thus, the federal power, which has always existed, to seize possession of property prior to payment of compensation has been legislatively recognized and procedures for such taking have been set out in various statutes; in addition, there has been nonstatutory confirmation of the power to take possession. The important point, in the present connection, is that this Court has always recognized that the substantive law, such as the measure of just compensation, is the same whatever form the exercise of eminent domain takes. This is necessarily so since the landowners' constitutional rights are the same whether the Tucker Act procedure or condemnation proceedings are employed. See, e.g., *Hurley* v. *Kincaid*, 285 U.S. 95, 104, that "The compensation which he may obtain in such a proceeding [Tucker Act] will be the same as that which he might have been awarded had the defendants instituted condemnation proceedings which it is contended the statute requires." Cf. *United States* v. *Dickinson*, 331 U.S. 745; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *2,648.31 Acres of Land*, 218 F. 2d 518 (C.A. 4). In *Jacobs* v. *United States*, 290 U.S. 13, this Court declared (p. 16): "The fact that condemnation proceedings were not instituted and that the right was

asserted in suits by the owners did not change the essential nature of the claim." And as recently stated, "Under the decisions it is of no moment whether the taking is by physical action of the Government, or by means of condemnation proceedings. The measure of compensation is the same; only the procedure differs." *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375, 379 (C.A. 7).

2. Basic to the Tucker Act decisions is the fact that the taking which creates the right to compensation is the physical seizure of the property. In one of the earliest and leading cases, *United States* v. *Lynah*, 188 U.S. 445, 470-471, the distinction between the taking and the transfer of title was spelled out as follows:

> It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and *when the amount awarded as compensation is paid the title*, the fee with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner. (Emphasis added.)

The principle is reiterated in brief form in later decisions that "The owner is protected by the rule that title does not pass until compensation has been ascer-

tained and paid * * *." *Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 587; *Danforth* v. *United States*, 308 U.S. 271, 284-285; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U.S. 641, 659.[4] In Tucker Act cases there is always some ambiguity as to the extent of the interest taken. Circumstances may indicate merely a temporary occupancy rather than a permanent taking (*United States* v. *Causby*, 328 U.S. 256), and only that interest is awarded which is necessary for operation of the government project involved (*United States* v. *Cress*, 243 U.S. 316). The findings of fact and judgment in the Tucker Act case specify the title which in the condemnation proceeding is designated in the petition. In both instances that title vests upon payment of the judgment. The many aspects in which the date of taking—meaning the date of taking possession—is significant will be mentioned later (*infra*, pp. 16-21) One of the most important is that at the time of taking the obligation to pay arises and the Constitution requires that compensation, usually in the form of interest, be made for the delay in payment. The basis for this requirement was expressed in *Old Dominion Co.* v. *United States*, 269 U.S. 55, 65:

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice

[4] Like all general rules, this one is subject to qualifications which have no bearing on the instant case, such as that if the United States has paid the value of property into court in proper proceedings it is not responsible for mistakes that may be made in distribution of the funds resulting in the true owner not receiving payment, nor does this rule prevent the passage of title in those cases where the owner fails to take advantage of his opportunity to recover compensation within the six-year limit of the Tucker Act or other applicable time limit.

for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston*, 15 Pick. 198, 208.

The leading case on this subject, *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, is express that taking means taking possession, when it says (p. 306): "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[5]

It is thus clear that a seizure of possession constitutes a taking giving rise to a claim for compensation which may be enforced in Tucker Act proceedings if the Government does not provide a remedy by instituting condemnation proceedings. And when condemnation proceedings are so instituted, the earlier taking of possession constitutes the date of taking. For example, in *United States* v. *Rogers*, 255 U.S. 163, interest was awarded from the taking in 1912 although the proceedings were not instituted until 1915.[6] See also *Forbes* v. *United States*, 268 Fed. 273, 278 (C.A. 5); *McKendry* v. *United States*, 219 F.2d 357 (C.A. 9); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 254 (C.A. 4).

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[5] This opinion is also significant in that it designates as "condemnation" proceedings under the Lever Act which procedurally is very similar to the Tucker Act (see *supra*, p. 7).

[6] 1912 was also used as the date of valuation. *United States* v. *Rogers*, 257 Fed. 397 (C.A. 8).

3. The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a, establishes a procedure whereby at any time before judgment in any pending condemnation proceeding the United States may file a declaration of taking and deposit estimated compensation in court. Thereupon, title vests in the United States, the right to compensation vests in the former owner, the United States is irrevocably committed to taking the land,[7] and the court is empowered to make appropriate orders as to possession and other matters. The Act provides for a judgment awarding compensation including interest on whatever amount by which the ultimate award may exceed the amount of the deposit. The prime purposes of this statute were, as its title states, "to expedite the construction of public buildings and works" by permitting the demolition of existing structures and construction of public buildings without awaiting the conclusion of the case (see section 5, 40 U.S.C. 258(e)), to prevent the accumulation of interest charges against the United States, and to relieve hardship on landowners by making funds available to them immediately. This latter element is important since few of the authorities for taking possession (*supra*, pp. 8-9) provide for or require the making of a deposit. The declaration of taking procedure is not a new and separate proceeding, but is merely an ancillary or incidental step in an existing proceeding. It does not change rules of finality for purposes of review. *Catlin* v. *United States*, 324 U.S. 229, 240-241. It is in addition to existing

[7] If no declaration is filed, the Government can abandon the condemnation at any time before the actual payment of the award, even after judgment. *Supra*, p. 8; *infra*, pp. 15-16.

rights and does not abrogate, modify or limit them. Section 4, 40 U.S.C. 258(d). The interest provisions of the Act are simply declaratory of the constitutional requirement and, hence, do not apply when just compensation is determined by the parties as a matter of agreement in a case where a declaration of taking was filed. *Albrecht* v. *United States*, 329 U.S. 599.

II.

Applying these principles, the Courts of Appeals had uniformly held, prior to the instant case, that "it is well settled that, either where no declaration of taking is filed, or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession the market value of the property taken should be determined as of the date possession was acquired." *11,000 Acres of Land, etc.* v. *United States*, 152 F. 2d 566 (C.A. 5), certiorari denied, 328 U.S. 835; *United States* v. *Vilbig*, 208 F. 2d 663 (C.A. 5); *Anderson* v. *United States*, 179 F. 2d 281 (C.A. [illegible]), certiorari denied, 339 U.S. 965; *Comparet* v. *United States*, 164 F. 2d 452 (C.A. 10); *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351 (C.A. 2). While holding that the Assignment of Claims Act was not violated for other reasons particular to that case, the court in *23 Tracts of Land* v. *United States*, 177 F. 2d 967, 970 (C.A. 6), likewise declared that "it would seem clear that the taking of physical possession of the property by the Government and the appropriation of it to its own purposes is a taking for which the then owner is entitled to compensation under the constitution * * *. This would seem to be equally true whether the taking is without authority of a court

order or in compliance with a court order requested by the condemnor."[8]

The decision below is thus inconsistent in principle with all of the Courts of Appeals cases dealing with the situation where possession is first taken and a declaration of taking is later filed. These cases cannot be distinguished, as the court below suggests, on the ground that they hold that, as an equitable rule, property should be valued at a time prior to the date which the court held to be the date of taking. (Appendix A, *infra*, pp. 27-28) Instead, they hold that "generally speaking the date property is taken is the correct valuation date" (*Vilbig*, p. 664) and in the *Anderson* case the opinion states the question before it to be "which date was the time of the taking." So also in *Comparet* the court ruled (p. 453): "When the Government acquired possession in 1942 there was a 'taking' of appellant's property for public use; compensation therefor was then due and payable, and under the Federal rule of decisions its fair market value should be determined as of that date." The holding in the present case that the claim for compensation does not arise until title is taken cannot be reconciled with the rationale of those decisions. And it is certainly illogical to conclude that compensation for a "taking" in 1946 is to be measured by values in 1943.

The fact that until title passes, either by filing of a declaration of taking or by payment of a final condemnation judgment or Tucker Act judgment, the United States may change its intention to take the property permanently, abandon the proceedings to

[8] The *23 Tracts of Land* case, like the present one, involved a transfer between the date the Government took possession and the subsequent filing of the declaration of taking.

take fee title, and then be liable only for the temporary possession it has taken does not prevent the claim for compensation from arising at the date of taking possession. It merely means that the extent of the taking, which is always more or less dubious in Tucker Act cases (see *supra*, p. 11), is also subject to that possible change of intention. Even the title which passes under the Declaration of Taking Act is defeasible under some circumstances. *Catlin* v. *United States*, 324 U.S. 229. The existence of power to abandon does not negative a taking under the Tucker Act or in condemnation proceedings when no declaration of taking is filed. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7). And the filing of a declaration of taking subsequent to an actual taking should not affect the result since the declaration is merely ancillary and incidental to the pending proceeding.

For these reasons, we submit that the decision below is (a) gravely erroneous because of the court's misapprehension of the fundamental nature of the federal power of eminent domain and the established modes of its exercise, and also (b) in basic conflict with the principles of comparable eminent domain cases in other circuits.

III.

If the theory of the view taken below were consistently applied, the consequences would be highly disruptive and damaging.

1. Certainly, the rights of landowners would be seriously impaired. The obligation of the United States to compensate, usually in the form of interest, for

failing to make payment at the date of taking cannot arise until there has been a taking and the claim to compensation has arisen. To deprive landowners of interest prior to the time title to their property vests in the United States would be of serious concern in view of the many pending condemnation proceedings for river improvements, airfields and other governmental purposes. And the ruling would discourage government officers from filing declarations of taking and thereby subjecting the United States to interest liability which, under the theory of this decision, would not otherwise exist—since federal officials are under a duty not to waste government funds. Cf. *United States* v. *Miller*, 317 U.S. 369, 381.

In other cases the rationale of the decision would also deprive landowners of compensation to which they should be entitled. In *United States* v. *Dickinson*, 331 U.S. 745, this Court held that the landowner's recovery was not to be decreased by reclamation that occurred after the date of taking. Since the extent of ownership must be determined at the time the claim to compensation arises (the date of filing the declaration of taking, under the holding below), the landowner's compensation would under the decision below be diminished by reclamation activities of the United States while in possession prior to filing a declaration of taking. And the decision throws doubt upon the owner's right to include in compensation improvements damaged or destroyed by the Government prior to taking title.

The ruling might likewise have the effect of depriving a particular party of compensation to which it is justly entitled. Many properties, such as railroad rights-of-way, churches, public parks, etc., are held

subject to reverter if use for the designated purpose ceases. Heretofore, the federal courts have uniformly rejected the claim of the reversioner to any substantial compensation for the reason, *inter alia*, that there was no gap between cessation of use and taking. *Terminal Coal Company* v. *United States*, 172 F. 2d 113, 116 (C.A. 3).[9] The court there stated "The contention of appellant could have validity only if some interval of time elapsed between the surrender of the interest of the railroad and that of appellant." But under the decision below an interval of years might intervene between cessation of use and accrual of the claim to compensation. With such a foundation it would be difficult logically to deny the claim of the reversioner to all of the compensation.

A different aspect of the same fundamental problem is shown by *People* v. *Peninsula Title Guaranty Company*, 301 P. 2d 1(Cal.), holding that the taking of possession under court order is a taking, with the result that the land was not subject to a special assessment lien for drainage purposes attempted to be subsequently recorded. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7), suggests a situation where to protect himself against claims of his tenant a lessor might be forced to oppose a taking of possession rather than settle the matter amicably with the United States. If a taking of possession is not a taking, the tenant might well claim eviction and breach of the covenant of quiet enjoyment.

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[9] *People of Puerto Rico* v. *United States*, 132 F. 2d 220, 221-222 (C.A. 1), certiorari denied, 319 U.S. 752; *Woodville* v. *United States*, 152 F. 2d 735, 737-738 (C.A. 10), certiorari denied, 328 U.S. 842; *State of Texas* v. *Harris County Houston Ship C. N. Dist.*, 158 F. 2d 861, 864 (C. A. 5).

Each of these illustrations simply emphasizes the great difficulty, if not impossibility, of valuing property as of one date, but according to its physical condition and the state of its title at a considerably later date.

2. The theory of the decision would likewise open the door to manipulations which would unduly increase the Government's liability. The status of the lands, as well as the designation of the person entitled to receive compensation, must be fixed at the date the claim arises. After the United States takes possession the landowner has, in practical effect, only a right to recover compensation. A subsequent conveyance of title is therefore simply a transfer of that right and does not transfer the right to use the land, as does the usual conveyance executed prior to the governmental taking of possession. A single parcel, because of plottage or other reasons, may be valued at more than the sum of its four component tracts. Cf. *United States* v. *Runner*, 174 F. 2d 651 (C.A. 10). The ruling below permits the owners after the date of valuation to combine their interests by transfer, solely for the purpose of obtaining an increased award. Similarly, after physical use has ceased, a purchase might be made by an adjoining landowner in order to create a claim, not otherwise existing, for so-called severance damages.[10] See *United States* v. *Miller*, 317 U.S. 369. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, further demonstrates the possibility of manipulation. There, land subject to an easement of way, light,

[10] The possibility of some such claim is not just speculation. There is now pending in the Court of Appeals for the Second Circuit a case in which the owner claims severance damage on the basis of a "correction deed" received after the date of taking.

and air was condemned. The fee owner and the beneficiary of the easement claimed that the property should be valued as an unencumbered fee and the resulting award divided between those interested. The values as agreed to by the parties showed that acceptance of this contention would have increased the value more than tenfold from $5,000 to $60,000. This Court rejected the claim holding that "the Constitution does not require a disregard of the mode of ownership of the state of the title." Similar cases in federal condemnation arose in *Southern California Fisherman's Association* v. *United States*, 174 F. 2d 739 (C.A. 9) and *Messer* v. *United States*, 157 F. 2d 793 (C.A. 5). Landowners could, under the decision below, avoid this rule by simply merging their interests after the Government has taken possession but before title has passed.[11]

3. While by no means exhaustive, the foregoing are a few examples of the scope of the consequences which

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[11] The rationale of the holding below that the taking occurred in 1946 (when the declaration of taking was filed) should have compelled the court to hold that the property taken must be valued as of that time. Inconsistently, the court held, however, that the valuation should be measured as of 1943, when possession was taken. Appendix A, *infra*, pp. 27-28; *supra*, pp. 14-15. If this qualification as to valuation were removed by the Fifth Circuit or some other court, the Government would apparently be forced to pay rental value for the period between the taking of possession and the filing of the declaration of taking, and the value of the property would then be valued as of the later date. In most instances, the total award would be much higher than an award calculated on the value of the property as of the time of taking possession. The alternative would be to force the United States to file a declaration of taking in every case, even though that procedure has been recognized, since its inception, as a mere ancillary mechanism which need not be used. *Supra*, pp. 13-14.

follow a determination as to the date of taking in condemnation proceedings. That determination is basic to the orderly conduct of every such case. There are now pending 2,530 condemnation cases, involving 30,736 tracts of land. In a great many of them the authority to take possession before filing a declaration of taking has been exercised. Although the vast majority of these cases will ordinarily be settled without trial, doubt as to the date of taking will undoubtedly make more difficult the ascertainment of the amount owing, either by agreement or trial. Such doubt will likewise impede the resolution of disputes between claimants as to title and the final distribution of the amount awarded. The decision and opinion below by a Court of Appeals with jurisdiction over an area of great importance to federal eminent domain cannot fail to raise such troubling doubts.

CONCLUSION

It is submitted that the decision below is erroneous and is in conflict with well-established principles on an issue which is fundamental to the conduct of federal condemnation proceedings. It is important both to the United States and to the landowners that this question be resolved by this Court. It is submitted, therefore, that this petition for a writ of certiorari should be granted.

Respectfully,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

APRIL 1957

APPENDIX A

1. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16125

C. M. DOW, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas.

(December 11, 1956.)

L. KEITH SIMMER, c/o Fulbright, Crooker, Freeman, Bates & Jaworski, Houston, Texas, for Appellant.

RICHARD C. PEET, Attorney, Department of Justice [with him on the brief were PERRY W. MORTON, Assistant Attorney General; MALCOLM R. WILKEY, United States Attorney, Houston, Texas; SCOTT W. KEY, Assistant United States Attorney, Houston, Texas; and ROGER P. MARQUIS, Attorney, Department of Justice], for Appellee.

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a summary judgment dismissing C. M. Dow as a party defendant in a condemnation proceeding which, in accordance with Rule 54(b), F.R.C.P., was entered as a final and appealable judgment.

The United States commenced proceedings to condemn an easement for a pipe line right of way on March 9, 1943, and shortly thereafter went into possession of the easement pursuant to an order obtained

under the Second War Powers Act of 1942, 56 Stat. 177.[1] More than two years thereafter, on November 1, 1945, Dow acquired by deed, made subject to the condemnation proceedings, 617.289 acres of land which included 2.7139 acres within the right of way. Seven months thereafter, on May 31, 1946, the Government filed a declaration of taking and deposited estimated compensation for the taking of Parcel No. 1, the particular 2.7139 acres.[2]

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[1] "* * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * *.

"Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law."

[2] Pursuant to 40 U.S.C.A. 258(a), providing in pertinent part as follows:

"In any proceeding * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein * * *.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just com-

Commissioners appointed by the Court under the Texas practice held a hearing at which Dow appeared and offered evidence as to value. The Commissioners' report awarded $4,500.00 as compensation for the taking of Parcel No. 1. Dow's vendors, or their heirs or representatives, were not served with notice, and did not appear at the compensation hearing. After the report, however, the Government's attorney reached the conclusion that Dow was not entitled to compensation for the taking of Parcel No. 1, and moved to set aside the award alleging that the parties entitled to compensation were neither served nor present at the commissioners' hearing; and moved also for a summary judgment dismissing Dow's claim on the ground that his deed was a prohibited assignment of a claim against the Government.[2]

Answering said motion, Dow reiterated his claim. Notwithstanding the fact that his vendors appeared and filed a waiver to any compensation due from the Government and requested that the award be paid to

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pensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

[2] Under the Anti-Assignment Act, 31 U.S.C.A. 203, providing in pertinent part as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *."

Dow,[4] the motion for summary judgment dismissing Dow was granted and this appeal followed.

The sole question for decision is whether the act prohibiting assignment of claims against the United States bars Dow's claim to compensation, he having purchased after possession had been awarded in the proceedings but prior to the filing of a declaration of taking. Under the explicit provisions of the Anti-Assignment Statute, a claim to compensation for a taking of property cannot be voluntarily transferred after it has arisen.[5] Otherwise stated then, the question is whether the taking occurred and the claim arose when the United States went into possession of the easement pursuant to the order of possession,[6] or subsequently upon the filing of the declaration of taking and of the deposit in the court.[7]

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[4] By leave of the court, requested just before and granted after Dow had been dismissed, this appearance and disclaimer were withdrawn. The findings of fact accompanying Dow's dismissal recited that his vendors "appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same."

[5] See, e.g., United States v. Shannon, 342 U.S. 288 * * *; 23 Tracts of Land, etc. v. United States, 177 F. 2d 967 (6th Cir.).

[6] Providing in part:

"Leave * * * is hereby granted the United States of America to take immediate possession of said land * * * *to the extent of the interest to be acquired by the United States of America* * * *." (Emphasis supplied.)

[7] The judgment entered thereon provided:

"It is therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said Declaration of Taking, and the depositing in the Registry of this Court of the sum of $3801.30, a perpetual right of way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of

The Government insists that when it took possession there was a taking of the property, and that thereupon the claim to compensation arose. Concededly, however, the United States was free to abandon the condemnation at any time before filing its declaration of taking.[8] In such an event, the United States would have become liable for actual use and occupancy with restoration damage.[9] Such liability did not actually accrue. Instead, upon the filing of the declaration of taking the United States became irrevocably committed to the payment of the ultimate award.[10] The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow. Theretofore the taking was not complete. Cf. *United States* v. *Dickinson*, 331 U.S. 745, 749 * * *.

The Declaration of Taking Act fixed a definite time of taking and of accrual of the claim for compensation and removed much of the uncertainty theretofore existing.[11] Nothing herein said is inconsistent with,

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a pipe line * * * vested in the United States of America * * * and said lands are deemed to have been condemned and taken for the use of the United States of America, *and the rights to just compensation for the property taken, upon the filing of said Declaration of Taking and making of said deposit, vested in the persons entitled thereto* * * *." (Emphasis supplied.)

[8] O'Connor v. United States, 9th Cir., 155 F. 2d 425; Moody v. Wickard, D.C. Cir., * * * 136 F. 2d 801; United States v. One Parcel of Land, D.C. Cir., 131 F. Supp. 443.

"Until taking, the condemnor may discontinue or abandon his effort." Danforth v. United States, 308 U.S. 271, at p. 284 * * *.

[9] Cherokee Nation v. South Kansas Ry. Co., 135 U.S. 641, 660 * * *, and authorities cited in Footnote 4, supra.

[10] 40 U.S.C.A. 258(e); Catlin v. United States, 324 U.S. 229, 241, 242 * * *.

[11] See Danforth v. United States, 308 U.S. 271, 283-284 * * *; United States v. .8677 Acre of Land in Richland County, 42 F. Supp. 91; United States v. 40,379 Square Feet of Land, 58 F. Supp. 246, 6 Nichols, "Eminent Domain", § 27.25, p. 331.

or is meant to change, the equitable rule that where the declaration of taking is filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the date possession was acquired.[12]

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVISED AND REMANDED.

2. Judgment of the Court of Appeals

Extract from the Minutes of December 11, 1956.

No. 16125.

C. M. DOW,

VERSUS

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

* * * * *

APPENDIX B

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, provides:

> The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is

[12] 11,000 Acres of Land, etc. v. United States, 5th Cir., 152 F. 2d 566; Anderson v. United States, 5th Cir., 179 F. 2d 281.

hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

The relevant portions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), are as follows:

SEC. 1. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement

or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be

allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

* * * * *

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority ~~conferred by the laws of the United~~ States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded

as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of Section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The pertinent provisions of the Anti-Assignment Act, 31 U.S.C. 203, are as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, [except as hereinafter provided], shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

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therefore that there was no prohibited assignment of a claim against the United States (R. 67). The case was remanded for further proceedings consistent with this holding. This Court granted certiorari on May 27, 1957 (R. 75).

SUMMARY OF ARGUMENT

I

Since the court below held, and the respondent does not dispute, that a claim for compensation becomes vested at the time of a taking, and since this Court has made it clear that a claim for compensation from the government may not be assigned after it has vested, the issue here is when did the taking occur.

A. The federal right of eminent domain can be and is regularly exercised either (a) through the medium of condemnation proceedings instituted by the United States, (b) by physical seizure of property leaving the land-owner to suit under the Tucker Act, or (c) by statutory process which may have some element of both of these procedures. The substantial rights and liabilities of the parties are the same whatever proceeding is used.

B. Physical seizure of property is a taking giving rise to a claim for compensation which may be presented under the Tucker Act or in condemnation proceedings. Title does not pass until payment. Hence, if the obtaining of physical possession were not a taking, the Tucker Act claim would have no basis at all. And, when condemnation proceedings are later instituted, the taking for purposes of determining value and interest is the date the owners were

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No. 102

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

C. M. DOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington 25, D. C.

deprived of beneficial use of the property. These principles have uniformly been applied by Federal appellate courts, except for the instant case.

C. The power of the United States to abandon its project after taking possession and thereupon to pay only for the temporary use of the property does not alter the fact that taking of possession is a taking. It merely means that the extent of the interest taken may be subject to question. Indeed, that is always the case in temporary emergency takings, as, for example, those for the duration of World War II.

II

The passage of title when the Government invoked the Declaration of Taking Act by filing a declaration of taking, three years after the easement had been appropriated, was not a new taking, nor did it obliterate the previous taking. The invocation of this ancillary procedure at the option of Government agents settled any prior question that the easement taken might not be permanent, bound the Government to accept the easement at the figure finally fixed, and made available funds constituting at least part payment. The statutory provision that the right to compensation shall vest at the time the declaration of taking is filed and title passes applies in situations where the right has not already vested; it does not require that a right which has previously vested must be disregarded.

III

Fairness to both the Government and the landowner requires a holding that the transfer of possession fixes

the date as of which payment should be made. Under the decision below the landowner would be deprived of his right to compensation for delay in payment. Moreover, to hold that the claim did not arise until later might also unfairly deprive owners of compensation as, for example, the holder of a fee subject to reverter, whenever use for the stated purpose should cease.

To allow trafficking in the claim against the United States by transfer of what is then only technical title since it has lost its prime effect of enabling the grantee to enter upon and use the land, would open the door for manipulations whereby the amount claimed might be artificially inflated without just cause.

ARGUMENT

I

THE CLAIM FOR COMPENSATION AROSE WHEN THE UNITED STATES PHYSICALLY TOOK POSSESSION AND BUILT THE PIPE LINE IN 1943

The Court of Appeals stated the issue of this case as being "whether the taking occurred and the claim arose when the United States went into possession" or when it subsequently made a deposit under the Declaration of Taking Act (R. 66). It agreed that, under the Assignment of Claims Act, a claim to compensation for the taking of property cannot be voluntarily transferred after it has arisen, citing *United States* v. *Shannon*, 342 U. S. 288; *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6). In addition, it is a principle of eminent domain law that: "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an

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earlier or later date, receives the payment." *Danforth* v. *United States*, 308 U. S. 271, 284; cf. *United States* v. *Dickinson*, 331 U. S. 745. This Court, in *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 10–11, regarded it as well settled that when a railroad company, having the power of eminent domain, entered into actual possession of land, the right to payment "belongs to the owner at the time the railroad company took possession" and is a personal claim which does not pass with a subsequent deed unless expressly conveyed. Any such express conveyance in this case would be a voluntary assignment of a claim against the United States rendered void by the Assignment of Claims Act.[8] The holding of the *Roberts* case that the claim arises upon the entry into possession is clearly correct and is a necessary result of fundamental principles with regard to the exercise of the federal power of eminent domain.

A. THE BASIC PRINCIPLES ARE THE SAME WHETHER THE FEDERAL RIGHT OF EMINENT DOMAIN IS EXERCISED THROUGH THE MEDIUM OF PHYSICAL SEIZURE, CONDEMNATION PROCEEDINGS, OR IN OTHER WAYS

The right of eminent domain does not rest upon express constitutional grant, but is implied from the necessity of acquiring the property essential to prosecution of the Government's appropriate functions without interference by owners unwilling to part with their property. *Kohl* v. *United States*, 91 U. S. 367, 371–372; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 527–530. The Fifth Amendment limits the exer-

[8] There is, thus, no basis for invocation here of the exception to that Act of assignments by operation of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 102

UNITED STATES OF AMERICA, PETITIONER

v.

C. M. DOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 64–67) is reported at 238 F. 2d 898.

JURISDICTION

The judgment of the Court of Appeals was entered December 11, 1956 (R. 68). A timely petition for rehearing *en banc* was denied on January 3, 1957 (R. 68–74). By order of Mr. Justice Black, dated April 1, 1957, the time for filing a petition for certiorari was extended to April 19, 1957, the petition was filed on April 11, 1957, and was granted May 27, 1957 (R. 75). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in proceedings to condemn an easement, a claim to compensation vested in the landowner at the time of entry into possession by the United States pursuant to court order, or subsequently vested in a transferee at the time a declaration of taking was filed three years later.

STATUTES INVOLVED

Section 1 of the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, provides:

> The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board,

commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

The relevant portions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258 (a)–258 (e), are as follows:

SEC. 1. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or

easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the

rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

* * * * *

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be

construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, nothwithstanding the provisions of Section 355 of the Revised Statutes of the United States: *Provided*, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The pertinent provisions of the Assignment of Claims Act, 31 U. S. C. 203, are as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, [except as hereinafter provided], shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

STATEMENT

This condemnation proceeding was commenced in March 1943, when the United States filed its petition to acquire a right-of-way for a pipe line for petroleum products or other materials over certain lands in Harris County, Texas (R. 3–17). Included therein was Parcel 1, the subject of the present case, representing a strip totaling some 2.7 acres out of a 617-acre tract (R. 5–6). The Government's petition relied upon various statutes including an 1888 Act and Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177 (R. 4). The court, *ex parte*, ordered the immediate delivery of possession as requested in the petition (R. 16, 28–30). Within the following 10 days, the United States and its contractor entered into actual physical possession and commenced laying the pipe line through this tract (R. 31, 49). The line was completed in 1943 and has been in continuous use since that time (R. 31, 49).

In November 1945, the 617-acre tract was sold to C. M. Dow (R. 32–36). The deed gave a metes and bounds description and included a general warranty except for an electric railway company right-of-way "and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned" (R. 35). Later, the deed states (R. 35) "It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings: * * *." There follows a listing of (a) a pipe line right-of-way easement dated 1920, (b) an-

other pipe line right-of-way easement dated 1920, (c) an unrecorded power line easement and (R. 36):

> (d) Condemnation proceedings filed by the United States of America v. James Bute et al, Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. * * *

In May 1946, subsequent to Dow's acquisition of title, the Government filed a declaration of taking, covering this and several other parcels included in the right-of-way, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258(a)–258(e). Estimated compensation was deposited in court and judgment on the declaration of taking confirming these actions was entered (R. 17–22). A few months later, in October 1946, a second amendment to the petition was filed to name additional parties defendant including Dow (R. 22–23). The question of compensation was referred to commissioners under the Texas practice which at that time was applicable to federal condemnation proceedings.[1] Dow appeared at the commissioners' hearings in November 1948, pursuant to notice served upon him and presented evidence as to value (R. 40). His grantors were not served with notice of the hearing and no one else appeared at that time (R. 40).

Later in November 1948, the commissioners reported, awarding $4,450 as compensation for imposition of the easement over this tract (R. 43). The United States moved to set aside this award alleging

[1] Rule 71A, F. R. C. P., establishing federal condemnation procedure, became effective August 1, 1951.

that Dow had no interest in the land at the date it took possession of the right-of-way, and, therefore, was not entitled to receive compensation (R. 24–38). By agreement of the parties this motion was dropped from the court's calendar (R. 39) but subsequently the same relief was sought by a motion for summary judgment (R. 39–42). The court granted the motion in March, 1956. It found the facts as outlined above and, in addition, that the grantors intended to convey to Dow "all their right, title and interest in the said Parcel No. 1 or in the award to be made for the same" (R. 48–51). Its conclusions of law were that the deed is a prohibited assignment of a claim against the United States, is ineffective to convey to Dow the compensation due from the United States, and that Dow should be dismissed from the proceeding (R. 51–52). Judgment was entered accordingly, appropriate recitals being made under Rule 54 (b), F. R. C. P.[1] A few days later the court set aside the commissioners' award, permitted Dow's grantors to withdraw a disclaimer previously filed and to claim compensation for this parcel, and directed that further proceedings be had under Rule 71A, F. R. C. P. (R. 58–59).

The Court of Appeals for the Fifth Circuit reversed. It held that, despite the earlier physical appropriation by the United States in 1943, no claim to compensation "arose and vested" until the filing of a declaration of taking three years later in 1946,[2] and

[2] Judge Rives, the author of the opinion below, had expressed the same views earlier in his dissenting opinion in *Slattery Company, Inc.* v. *United States of America*, 231 F. 2d 37, 39.

cise of this power to the extent that it requires the payment of just compensation. However, it does not, as do the constitutions of many states (often referred to as "first pay" jurisdictions), require that compensation be paid in advance, or at the time, of appropriation of the property. *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641; *Hurley* v. *Kincaid*, 285 U. S. 95. See also *Garrow* v. *United States*, 131 F. 2d 724 (C. A. 5), certiorari denied, 318 U. S. 765. In the "first pay" jurisdictions, a governmental body which seizes property prior to institution of some proceeding to determine compensation is a trespasser. But when a properly authorized officer of the Federal Government physically occupies property, it is not a tort or trespass, but constitutes a taking under the power of eminent domain. The owner is provided an adequate remedy to obtain compensation, in the District Court or Court of Claims, for such a taking by the Tucker Act (now 28 U. S. C. 1346 (a) (2) and 1491) and consequently cannot prevent the taking by injunction nor recover trespass damages against the government officers or agents. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21-23.

The "first pay" constitutions in substance mean that the right of eminent domain can be exercised only through the medium of condemnation proceedings. There is no such limitation in exercise of the right by the United States through its agencies. The right of eminent domain has been exercised for more than 80 years by physical acts constituting a seizure of real

estate or the assertion of dominion over it. Thus *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181, declared that "where real estate is actually invaded * * * so as to effectually destroy or impair its usefulness, it is a taking* * *." This procedure imposes upon the landowner the burden of instituting judicial proceedings to obtain just compensation. Federal statutes, especially during World War I, have established a similar process under which there is an administrative seizure accompanied by an offer of payment. If dissatisfied, the landowner is obliged to bring suit to recover compensation. See, *e. g.*, Section 10 of the Lever Act, 40 Stat. 276, 279; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 302.

Conversely, the United States initiates the court proceedings when the eminent domain right is exercised by means of condemnation proceedings. The first exercise of that power by proceedings brought by the United States in a federal court appears to be *Kohl* v. *United States*, 91 U. S. 367. In 1888 and 1890, two general statutes, which are still effective, were enacted, providing authority for the institution of condemnation proceedings whenever government officers are empowered to procure real estate for public uses. Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257; Act of August 18, 1890, 26 Stat. 316, 50 U. S. C. 171. At that time, the procedure in such cases conformed to local law, and this was not changed until Rule 71A, F. R. C. P., became effective in 1951, except for the ancillary procedure established by the Declaration of Taking Act of 1931, discussed later (*infra*, pp. 27–33).

The condemnation proceedings under the 1888 and 1890 Acts (which are now often denominated "ordinary" proceedings) constitute a process whereby the price of acquisition can be ascertained before any rights in the land are acquired by the Government. In such cases, the judgment represents, in effect, an offer to the condemnor which it is free to accept or reject. Upon acceptance by payment of the stated amount into court, title to and the right to possession of the interest condemned vest in the Government. See *Danforth* v. *United States*, 308 U. S. 271, 284–285. Such "ordinary" condemnation proceedings are still frequently employed when time is not pressing. However, at least by the time of World War I, the need for expedition resulted in the amendment of the 1890 Act so as to permit the taking of immediate possession of lands as to which proceedings to condemn for military purposes have been instituted. Act of July 2, 1917, 40 Stat. 241; 50 U. S. C. 171. A similar permanent authority for taking immediate possession of lands subject to condemnation is applicable to river and harbor improvements. Act of July 18, 1918, 40 Stat. 911, 33 U. S. C. 594. Various other statutes have authorized the courts to order the taking of immediate possession and such orders have been entered in the absence of statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C. A. 8). During World War II, the Second War Powers Act authorized the immediate taking of possession on court order, and this authority, under which possession was taken in the instant case, was widely used. Act of March 27, 1942, 56 Stat. 176 (*supra*, pp. 2–3). But the

power to take possession is not surrendered by th institution of condemnation proceedings; therefore even after a condemnation proceeding is instituted possession can still be taken under the general executive power without court order. *United States v Merchants Transfer & Storage Co.*, 144 F. 2d 32 (C. A. 9).

This examination of the two major procedures is no to be taken as indicating that those procedures are exclusive. Statutes have from time to time established procedures which have some of the features o both of these major categories. An early example i the Act of February 22, 1867, 14 Stat. 399, which is still law, 24 U. S. C. 271. Congress there provided for the establishment of national cemeteries and made it the duty of the Secretary of War to purchase real estate needed for that purpose and to obtain fee title. The Act then provides that, if he is unable to agree as to price with the owners or to obtain fee simple title from them, the Secretary "is hereby authorized to enter upon and appropriate any real estate" which is in his judgment suitable for the purposes of the Act (Section 4). Either the Secretary or the owner may apply for judicial appraisement in the court where the land is situated (Section 5). The Act concludes (Section 6) that fee simple title shall, upon payment of the appraisal value to the owners or deposit in court, be vested in the United States.

For present purposes the important point is that, whatever form the proceedings may take, two substantive rights exist. One is the governmental right

to seize and use property for any appropriate public purpose. The other is the landowner's constitutional right, guaranteed by the Fifth Amendment, to receive just compensation. And that compensation must be just both to the owner who is deprived of his property and to the public which is to pay for it. *Bauman* v. *Ross*, 167 U. S. 548, 574. The substantive rights are the same whether the Tucker Act procedure or condemnation proceedings are employed. See *e. g.*, *Hurley* v. *Kincaid*, 285 U. S. 95, 104, that "The compensation which he may obtain in such a proceeding [Tucker Act] will be the same as that which he might have been awarded had the defendants instituted condemnation proceedings which it is contended the statute requires." Cf. *United States* v. *Dickinson*, 331 U. S. 745; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *2,648.31 Acres of Land*, 218 F. 2d 518 (C. A. 4). In *Jacobs* v. *United States*, 290 U. S. 13, this Court declared (p. 16): "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." A Court of Appeals recently stated, "Under the decisions it is of no moment whether the taking is by physical action of the Government, or by means of condemnation proceedings. The measure of compensation is the same; only the procedure differs." *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375, 379 (C. A. 7).

B. PHYSICAL SEIZURE OF PROPERTY GIVES RISE TO THE CLAIM FOR COMPENSATION, WHETHER THE AMOUNT IS DETERMINED UNDER THE TUCKER ACT OR IN CONDEMNATION PROCEEDINGS

Basic to the Tucker Act decisions is the fact that the taking which creates the right to compensation is

the physical seizure of the property. In one of the earliest and leading cases, *United States* v. *Lynah*, 188 U. S. 445, 470–471, the distinction between the taking and the transfer of title was spelled out as follows:

> It is clear from these authorities that *where the government* by the construction of a dam or other public works *so floods lands belonging to an individual as to substantially destroy their value there is a taking* within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from his that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and *when the amount awarded as compensation is paid the title, the fee,* with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—*pass to the government and it becomes henceforth the full owner.* [Emphasis added.]

The principle is reiterated in brief form in later decisions that "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid * * *." *Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 587; *Danforth* v. *United States,* 308 U. S. 271, 284–285; *Cherokee Nation* v. *Southern Kansas Railway Co.,* 135 U. S. 641, 659.[4] The

[4] The general rule is subject to qualifications which have no bearing on the instant case, such as that if the United States has paid the value of property into court in proper proceedings it is not responsible for mistakes that may be made in distribution of the funds resulting in the true owner not receiving

many aspects in which the date of taking—meaning the date of taking possession—is significant will be mentioned later (*infra*, pp. 34–39). One of the most important is that the obligation to pay arises as of the time of taking and the Constitution requires that compensation, usually in the form of interest, be made for any delay in payment. The basis for this requirement was expressed in *Old Dominion Co.* v. *United States*, 269 U. S. 55, 65:

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston*, 15 Pick. 198, 208.

The leading case on this subject, *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, is express that taking means taking possession, when it says (p. 306): "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[5] See also *Liggett & Myers* v. *United States*, 274 U. S.

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payment; nor does this rule prevent the passage of title in those cases where the owner fails to take advantage of his opportunity to recover compensation within the six-year limit of the Tucker Act or other applicable time limit.

[5] This opinion is also significant in that it characterizes as "condemnation" proceedings under the Lever Act which procedurally is very similar to the Tucker Act (see *supra*, p. 15).

215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13. The logic of the holding that the passage of title, not the taking of possession, constitutes the taking would make recovery under the Tucker Act impossible, since in that procedure there is no passage of title until the payment of compensation is made after the court's judgment.

It is thus clear that a seizure of possession constitutes a taking giving rise to a claim for compensation which may be enforced in Tucker Act proceedings if the Government does not provide a remedy by instituting condemnation proceedings. And when condemnation proceedings are so instituted, the earlier taking of possession constitutes the date of taking. For example, in *United States* v. *Rogers*, 255 U. S. 163, interest was awarded from the time of flooding in 1912 although the proceedings were not instituted until 1915.[6] This Court referred to the 1912 flooding as the time at which the Government "had actually taken them [the lands], and had deprived the owners of all beneficial use thereof * * *" (p. 169). See also *Forbes* v. *United States*, 268 Fed. 273, 278 (C. A. 5); *Barnes* v. *United States*, 241 F. 2d 252 (C. A. 9); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 254 (C. A. 4).

The same principles have led the courts of appeals to hold that "it is well settled that, either where no declaration of taking is filed or where, as here, the

[6] 1912 was also used as the date of valuation. *United States* v. *Rogers*, 257 Fed. 397 (C. A. 8).

declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired." *11,000 Acres of Land, etc.* v. *United States*, 152 F. 2d 566, 568 (C. A. 5), certiorari denied, 328 U. S. 835; *United States* v. *Vilbig*, 208 F. 2d 663 (C. A. 5); *Anderson* v. *United States*, 179 F. 2d 281 (C. A. 5), certiorari denied, 339 U. S. 965; *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10); *United States* v. *6.87 Acres of Land, etc.*, 147 F. 2d 351 (C. A. 2). See also *United States* v. *Mahowald*, 209 F. 2d 751 (C. A. 8). These decisions are all founded on the proposition that market value is to be determined at the date of taking. Thus, *Vilbig* holds that "generally speaking the date property is taken is the correct valuation date" (208 F. 2d at p. 664) and the *Anderson* opinion states the question before it to be "which date was the time of taking" (179 F. 2d at p. 282). So also in *Comparet* the court ruled (164 F. 2d at p. 453). "When the Government acquired possession in 1942 there was a 'taking' of appellant's property for public use; compensation therefor was then due and payable, and under the Federal rule of decisions its fair market value should be determined as of that date."

Addressing itself specifically to the question as to when a claim arises, the court in *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6), declared (p. 970) that "it would seem clear that the taking of physical possession of the property by the Government and the appropriation of it to its own purposes is a taking for which the then owner is entitled to

compensation under the constitution. The owner at that time, rather than the owner at an earlier or later date, is the one who has the claim and is to receive the payment. This would seem to be equally true whether the taking is without authority of a court order or in compliance with a court order requested by the condemnor [citations]". The 1867 statute (*supra*, p. 17), distinguishing between physical appropriation and vesting of title, shows the congressional understanding, since early days, in accord with this long-established line of decisions.

The present opinion stands alone, we believe, among all the federal appellate decisions in holding that taking means taking of title so that no claim arises until then. Its mistake apparently stems from a misunderstanding of two decisions of this Court, *Danforth* v. *United States*, 308 U. S. 271, and *United States* v. *Dickinson*, 331 U. S. 745. *Danforth* rejected the landowner's claim for interest upon the ground that there had been in that case no taking. There was neither physical seizure (or in the language of the opinion (p. 286) "direct appropriation"), nor had a substantial burden of caring for greater floods, in the nature of an easement to flood, been imposed upon the land. Upon this basis, the opinion restated the principles summarized above (p. 16) applicable to ordinary condemnation proceedings where neither possession nor title is taken during the course of the proceedings. Thus the Court held (p. 284) that: "Unless a taking has occurred previously in actuality or by a statutory provision * * *" the payment of

the award is the taking. By "actuality" the Court obviously meant physical taking of possession.

United States v. *Dickinson*, 331 U. S. 745, likewise lends no support to the lower court's theory that the taking is not complete until title passes. The problem in that case was at what point in the course of a continuous flooding process the taking of any easement might be considered to be complete so that the time limitation of the Tucker Act commenced to run. There was no suggestion that no taking occurred even after the flooding was complete until such time as title might vest. On the contrary, in holding that Dickinson's reclamation was no defense, the Court said (p. 751): "When the property was flooded the United States acquired the land and it became part of the river". We do not know of any case where the United States physically occupied property, under a grant of authority, but the owner was denied compensation therefor on the ground that there had been as yet no taking.[7]

[7] In his Brief in Opposition (p. 5), the respondent cites the following language from *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 659, as holding that taking occurs when title passes: "Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner." However, when this sentence is read in context, it is apparent that the Court was in fact talking not about the date as of which an owner was required to surrender his property, but rather about what legal rights he retained in order to assure himself of payment from a railroad which had previously occupied his property.

C. THE ABILITY OF THE UNITED STATES TO ABANDON ITS PROJECT UP TO THE TIME TITLE PASSES AND DISCONTINUE PROCEEDINGS TO CONDEMN FEE TITLE DOES NOT PREVENT PHYSICAL POSSESSION FROM BEING A TAKING

It was the power to abandon the proceedings which also seems to have greatly influenced the court below. (See R. 67). But the existence of that power does not change the fact that physical seizure is a taking. It merely means that the duration of the property interest taken may be ambiguous. An abandonment of the project after physical seizure and discontinuance of proceedings to condemn fee title or other interest results in reducing the interest taken to a temporary interest for the period of possession. *Moody* v. *Wickard*, 136 F. 2d 801 (C. A. D. C.), certiorari denied, 320 U. S. 775; *O'Conner* v. *United States*, 155 F. 2d 425 (C. A. 9). In that event, compensation is measured by the principles governing the taking of a right to use property temporarily. Cf. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1. Indeed, every temporary taking—for example, those many cases during World War II when use only for the duration of the emergency was needed—is, in effect, a taking in which affirmative notice is given from the beginning that there will be abandonment when the need ceases.

This indefiniteness is not greatly different from the ambiguity which exists in every taking where compensation is left to a Tucker Act proceeding. That title which is necessary for operation of the Government's project is ultimately transferred. *United States* v. *Cress*, 243 U. S. 316. Since there is no pleading de-

fining the nature of the property interest sought by the Government, reliance must be placed on other criteria. In most cases the nature of the project will indicate the extent of its permanency, as in the case of dams and other river improvements. On the other hand, use of the property taken as part of a project of limited duration may indicate that only a temporary interest has been taken. Cf. *United States* v. *Causby*, 328 U. S. 256. And every Tucker Act taking, just as much as takings in the course of condemnation proceedings, is subject to the possibility that the Government will abandon its project. However, in the great mass of cases, whether they take the form of condemnation proceedings or Tucker Act cases, the judgment is in fact paid rather than the property being surrendered. At that time title to the interest originally taken passes to the Government. The possibility that a particular case may develop into one of those scattered instances where the project is abandoned does not alter the fact that seizure of possession is a taking.

The physical acts, here, of entering into physical possession within 10 days after the order of possession, the laying of a pipe line through the land, and the subsequent operation of the pipe line, clearly constituted a taking of an easement. There was no real question as to the duration of the easement. When the declaration of taking was filed, it did not change the nature of the taking; it merely provided a basis for making a payment which would limit liability for interest and provide the owner with immediate payment, events which otherwise would occur only when the final judgment should be paid. As an incident

of these steps, title passed to the Government and its right to abandon the taking, and thus change the duration of the interest taken, ended.

We submit that the taking occurred when possession was seized and that the claim for compensation then arose. No one would doubt that this would be the case if the condemnation proceeding had not been brought. The fact that the Government proceeded by means of condemnation and a court order for possession should not change the substantial result of the taking of possession.

II

THE FILING OF A DECLARATION OF TAKING THREE YEARS AFTER POSSESSION WAS TAKEN DID NOT DESTROY THE EXISTING CLAIM OR CHANGE ITS NATURE

The Court of Appeals gave controlling effect to the passage of title upon the filing of the declaration of taking and the deposit of funds in court. In cases where there had been no taking previously, such actions would constitute the date of taking and, hence, the date upon which the claim for compensation accrues. However, an earlier taking of possession establishes the date of taking and the date the claim accrues, as the courts held in *11,000 Acres of Land, Etc.* v. *United States*, 152 F. 2d 566 (C. A. 5), certiorari denied, 328 U. S. 835; *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6), and the other case cited *supra*, p. 22.

The Court of Appeals below thought (see R. 67) that the Declaration of Taking Act removed uncertainty theretofore existing as to what was the date of taking. But, as the cases just cited show, there had

never been the slightest doubt that a seizure of possession was a taking. In this respect there was no uncertainty for the Declaration of Taking Act to remove and it was enacted for entirely different purposes. Apparently the Court of Appeals shared the error of the court in *United States* v. *40,379 Square Feet of Land, etc.*, 58 F. Supp. 246 (D. Mass.) as to the purpose, meaning, and effect of federal condemnation statutes. That District Court thought that the Declaration of Taking Act was an independent condemnation statute, alternative to the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257. It spoke of takings "under the 1888 Act" or the Declaration of Taking Act as if they are mutually exclusive and said (58 F. Supp., p. 250) that it "was perhaps due to accident or confusion that this proceeding began under the 1888 Act * * *." The following analysis makes clear that the court misunderstood the function of the 1931 Declaration of Taking Act.[8]

A condemnation proceeding cannot be commenced under the Declaration of Taking Act. By its terms, it is an *ancillary* remedy which may be invoked at any time in "any proceeding * * * which has been or may be instituted * * *," *supra*, p. 3. It is the 1888 Act which authorizes the Attorney General to institute the proceedings and which confers jurisdiction upon the

[8] The court's misunderstanding is further illustrated by its assertion that state law determines the date as of which title is acquired and property is valued (58 F. Supp. at p. 249). These are matters of substantive law rather than procedure. Hence even before 1951, at a time when conformity to local procedure was required, federal law controlled those questions. *United States* v. *Miller*, 317 U. S. 369, 380; *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10); *United States* v. *Mahowald*, 209 F. 2d 751 (C. A. 8).

courts.[9] The Second War Powers Act supplemented this 1888 Act in authorizing condemnation for war purposes and in providing for immediate delivery of possession. Similarly, the Declaration of Taking Act supplemented the 1888 Act by providing for the filing of a declaration of taking in the pending proceeding. When the declaration is filed and deposit made, the Declaration of Taking Act provides that title vests in the United States and the right to compensation vests in the persons entitled thereto. The United States is then irrevocably committed to taking the land and the court is empowered to make appropriate orders as to possession and other matters. The Act provides for a judgment awarding compensation, including interest, on whatever amount the ultimate award may exceed the amount of the deposit.

As its title states (46 Stat. 1421), the objective of the statute was "to expedite the construction of public buildings and works", by permitting demolition of existing structures and construction of public structures without awaiting conclusion of the case (Section 5, 40 U. S. C. 258a (e)). In *United States* v. *Miller*, 317 U. S. 369, 381 said:

> The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the

[9] The jurisdictional and venue provisions of the Act are now codified in 28 U. S. C. 1358 and 1403.

> Government's estimate of the value of the property. * * *

The latter element is particularly important since few of the other statutory authorities for taking possession (*supra*, pp. 15–17) provide for or require the making of a deposit.

In *Catlin* v. *United States*, 324 U. S. 229, this Court pointed out that the Act is not an independent one providing for a new condemnation but "merely affords steps ancillary or incidental to suits brought under other statutes * * *." Further, the opinion stated (p. 240):

> The procedure clearly is ancillary to the main condemnation proceeding, cf. *United States* v. *17,280 Acres of Land*, 47 F. Supp. 267, 269, is intended to dovetail with it and by § 4 is declared expressly to provide rights which are to be "in addition to" preexisting rights and are not to "be construed as abrogating, limiting, or modifying" them. This provision, inserted primarily to safeguard the Government's interest, is not expressly so limited; and we think it may be applied also to safeguard the owner's preexisting rights where doing this will not be in essential conflict with the additional rights validly conferred on the Government. This would be done by preserving his preexisting right of appeal.

Accordingly, the decision was that the owner's preexisting right to challenge the taking upon appeal from the final judgment was preserved by construing the title vested under the statute to be a defeasible one.

Exactly the same reasoning applies to the present case so that the owner's preexisting right, arising at the date possession was taken, to recover compensation including an amount because of delay in payment from date of possession, was not abrogated by the filing of the declaration of taking in 1946. The provision of that Act that upon filing of the declaration and the making of the deposit the right to just compensation shall vest in the persons entitled thereto (*supra*, p. 4) obviously contemplated a case in which that right had not previously vested in the owners. Only by so construing the Act can the various statutes be dovetailed as was intended. Similarly, in order to give a reasonable application of the statute, this Court has held, although the Act does not in terms so provide, that the United States can secure the return of any overpayment it should deposit. *United States* v. *Miller*, 317 U. S. 369. Also, the interest provisions of the Act are simply declaratory of the constitutional requirement for compensation for delay in payment and, although the Act does not so provide, do not apply when compensation is determined by contract rather than by litigation. *Albrecht* v. *United States*, 329 U. S. 599.

The present case and the *Catlin* case are merely two examples of the way in which the various statutory procedures should be combined to obtain a sensible conclusion. The authority to take possession in both instances was used first to satisfy the emergency needs of the United States. In these instances the authority of the Declaration of Taking Act to obtain possession

was not required nor used. However, for many reasons, delay in entry of final judgment was inevitable. Hence, when appraisals and title data were obtained, the declaration of taking procedure was invoked for the purposes of reducing the Government's interest liability and of furnishing the owners with partial payment. The passage of title was solely incidental and not necessary to the Government's purposes. We submit that employment of the declaration of taking procedure for the purposes for which it was used was plainly appropriate and proper.

Other instances of employment of condemnation procedures to seek a reasonable result in the particular circumstances may be cited. In a case where the United States claimed to possess the right, without compensation, to use certain property for war purposes, but desired to condemn if it had no such right, the entire matter was settled in a condemnation proceeding wherein a declaration of taking was filed. Under the literal wording of the statute the right to compensation then vested in the owner but the Court of Appeals reasonably held that, since the United States did have the right of free use, no compensation was payable, saying that there was much good sense in combining alternative theories in a simple proceeding. *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C. A. 1). Condemnation proceedings are frequently employed in the nature of a quiet title action to acquire the land at a price which has been fixed by contract and the price is deposited in court with a declaration of taking. In such a case

it is not constitutional "just compensation" under literal application of the statute which is awarded, but rather the contract price determines the amount of the judgment. *Albrecht* v. *United States*, 329 U. S. 599; *Mahowald* v. *United States*, 176 F. 2d 509 (C. A. 8). So here, we submit, the literal language of the Act does not apply because the right to compensation had already vested in the landowner. The filing of the declaration of taking simply made the deposit available to the owner, reduced the Government's liability for interest, and gave assurance that the taking would not be abandoned. It had no other purpose and no other effect.

In his brief in opposition, the respondent argued (pp. 2–3) that the Government was trying to read out of the statute the provision that, upon the filing of a declaration of taking and the payment of the deposit, "the right to just compensation for the same shall vest in the persons entitled thereto; * * *" (*supra*, p. 4). This provision is of prime importance where there has been no previous taking at all, since in that circumstance it does fix the time when the right to compensation vests, regardless of when physical possession later passes. But this cannot mean that a right which has already become vested must be disregarded and a new right created under the statute. The Declaration of Taking Act means only that, if the right to just compensation has not already vested in the persons entitled thereto, the filing of the declaration shall vest the right; and in any case the Government shall no longer have the right to abandon the property.

III

THE RULE HERE ADVOCATED IS THE ONLY FAIR RESULT BOTH FROM THE POINT OF VIEW OF THE UNITED STATES AND OF THE LANDOWNER

The precise issue in the present case—whether it is the owner at the date of taking possession or the owner at the subsequent date when a declaration of taking is filed—financially affects the United States in only a minor degree so far as this case is concerned. There is nothing to indicate that the amount of compensation will be affected except that three years' interest will be disallowed, to the advantage of the United States. The court here found that the vendors intended to transfer to Dow all interest in the property or in the award (Fdg. 7, R. 51). However, normally speaking, real estate is sold "as is", that is, in its condition at the date of transfer, the vendor retaining existing causes of action for damages to the property (see *supra*, p. 13). Vendees are not generally anxious to buy a lawsuit. When, as in this case, the United States takes possession and constructs its project, subsequent purchasers are naturally going to value the property in that condition, not as it existed before the Government entry. Thus, the result we advocate would, we submit, be more consistent with normal real estate practice than that of the court below.

Beyond this particular case, many other important consequences result from the determination of the date of taking. The most significant of these are that it determines (1) the date from which interest repre-

senting compensation for delay in payment commences to run, (2) the date of valuation, and (3) the date as of which the condition of the property, both physically and title-wise, is fixed for valuation purposes.

Obviously, interest for delay in payment cannot be due until payment is due. Hence, under the decision below no interest is due until the declaration of taking is filed and deposit made. The decision below seems to say that the United States had no interest liability between 1943 and 1946. It said that liability for use and occupancy with restoration damage "did not actually accrue" since the United States did not abandon the proceeding.[10] It is unfair to the owner, and violates his constitutional rights, to deprive him of any compensation for that period. Moreover, the rule of the Court of Appeals would wipe out the compensation-for-delay-in-payment principle in all

[10] The court in *United States* v. *20,379 Square Feet of Land, etc.*, 58 F. Supp. 246 (D. Mass.), *supra*, met this problem by awarding the owner a sum for use and occupancy, greater in amount than interest would have provided, for the period from the time possession was taken until title passed. If the Government accomplished a complete and permanent taking at the time it took possession (as in the present case), the owner had no constitutional or statutory right to more than interest on the fair value of his property as of the time of taking, and running until payment. To transform the Government's possession into some sort of constructive lease for part, but not all, of the period prior to payment, is an awkward and unnecessary complication grafted upon the rights which this Court has many times held vest in the owner at the time of the initial taking. And this becomes additionally complicated when the Government's taking is of a temporary interest, for example for one year renewable for a stated period, as were many of the wartime takings.

cases when no declaration of taking is filed since otherwise title does not pass until the award is paid.

The second important consequence of the date of taking is that it establishes the date of valuation. The decisions so holding (*supra*, p. 22) do not, as the court below suggests, represent an equitable rule that property should be valued at a time prior to a taking. Rather, they are holding that the date of valuation, in all logic and reason, must coincide with the date of taking. It is eminently reasonable to determine the amount of a claim with regard to the facts existing at the date the claim accrues. The property owner's rights should be measured by reference to the time when he is deprived of use of his property.

The third important general aspect of the date of taking, and a correlative of the date of valuation, is the fixing of the condition with regard to which the valuation is made. Physical changes naturally follow the taking of possession by the Government. But a holding that the taking does not occur until later would render dubious the owner's right to recover for improvements destroyed or depreciation caused to the property by the Government's occupation. Cf. *United States* v. *Bobinski*, 244 F. 2d 299 (C. A. 2). So also the owner's compensation might well be reduced because of reclamation activities he conducted after the Government started to flood his land but before a declaration of taking was filed. Cf. *United States* v. *Dickinson*, 331 U. S. 745.

Postponement of the date of taking, and hence the date as of which the state of the title is determined, might likewise have the effect of depriving a particu-

lar party of the compensation to which it is justly entitled. Many properties, such as railroad rights-of-way, churches, public parks, etc., are held subject to reverter if use for the designated purpose ceases. Heretofore, the federal courts have uniformly rejected the claim of the reversioner to any substantial compensation for the reason, *inter alia*, that there was no gap between cessation of use and taking. *Terminal Coal Company* v. *United States*, 172 F. 2d 113, 116 (C. A. 3).[11] The court there stated "The contention of appellant could have validity only if some interval of time elapsed between the surrender of the interest of the railroad and that of appellant." But under the decision below an interval of years might intervene between cessation of use and accrual of the claim to compensation. With such a foundation it would be logically difficult to deny the claim of the reversioner to all of the compensation.

A different aspect of the same fundamental problem is shown by *People* v. *Peninsula Title Guaranty Company*, 301 P. 2d 1 (Cal.), holding that the taking of possession under court order is a taking, with the result that the land was not subject to a special assessment lien for drainage purposes attempted to be subsequently recorded. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7), suggests a situation where, to protect himself against claims of his tenant, a lessor might be forced to

[11] *People of Puerto Rico* v. *United States*, 132 F. 2d 220, 221–222 (C. A. 1), certiorari denied, 319 U. S. 752; *Woodville* v. *United States*, 152 F. 2d 735, 737–738 (C. A. 10), certiorari denied, 328 U. S. 842; *State of Texas* v. *Harris County Houston Ship C. N. Dist.*, 158 F. 2d 861, 864 (C. A. 5).

oppose a taking of possession rather than settle the matter amicably with the United States. If a taking of possession is not a taking, the tenant might well claim eviction and breach of the covenant of quiet enjoyment.

Each of these illustrations emphasizes the great difficulty, if not impossibility, of valuing property as of one date, but according to its physical condition and the state of its title at a considerably later date.

The separation of possession and taking would likewise open the door to manipulations which would unduly increase the Government's liability. After the United States takes possession, the landowner has, in practical effect, only a right to recover compensation. A single parcel, because of plottage or other reasons, may be valued at more than the sum of its four component tracts. Cf. *United States* v. *Runner*, 174 F. 2d 651 (C. A. 10). The ruling below permits the owners after the date of valuation to combine their interests by transfers, solely for the purpose of obtaining an increased award. Similarly, after physical use has ceased, a purchase might be made by an adjoining landowner in order to create a claim, not otherwise existing, for so-called severance damages. See *United States* v. *Miller*, 317 U. S. 369.

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189, further demonstrates the possibility of manipulation. There, land subject to an easement of way, light, and air was condemned. The fee owner and the beneficiary of the easement claimed that the property

should be valued as an unencumbered fee and the resulting award divided between those interested. On values agreed to by the parties, the acceptance of this contention would have increased the compensation awarded more than tenfold from $5,000 to $60,000. This Court rejected the claim holding that "the Constitution does not require a disregard of the mode of ownership—of the state of the title." Similar cases in federal condemnation arose in *Southern California Fisherman's Association* v. *United States*, 174 F. 2d 739 (C. A. 9), and *Messer* v. *United States*, 157 F. 2d 793 (C. A. 5). Landowners could, under the decision below, seek to avoid this rule by simply merging their interests after the Government has taken possession but before title has passed.

Also, federal officers could reduce the compensation payable to owners in some of the above instances by simply withholding filing of the declaration of taking until the situation most favorable to the Government exists. Cf. *United States* v. *Miller*, 317 U. S. 369. This is so since the invocation of the declaration of taking procedure rests solely in the discretion of the administrative officer.

On all these grounds, we submit that the decision below gives to the declaration and deposit an effect never intended, resulting in confusion, rather than the certainty the court below was searching for, and, in particular cases, producing an unfair award to property owners or to the United States.

CONCLUSION.

For the foregoing reasons it is submitted the judgment below should be reversed and that of the trial court affirmed.

Respectfully.

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1956

No. 102

UNITED STATES OF AMERICA,

Petitioner,

v.

C. M. DOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1956

No. 904

UNITED STATES OF AMERICA,

Petitioner,

v.

C. M. DOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

May It Please The Court:

STATEMENT

Petitioner's statement, although argumentative in nature, is substantially correct. This is a condemnation suit in which the 5th Circuit Court of Appeals held that Respondent, C. M. Dow, as the land owner when a declaration of taking was filed and the United States acquired title to a perpetual right of way easement across certain property, was the owner entitled to just compensation for the land condemned, rather than the former owners who had title to the property when the government entered into possession.

SUMMARY OF ARGUMENT

I. No grounds for review are shown by petitioner.

II. The Court below correctly decided that respondent, as the owner when the United States first became bound to take the property, was the proper person to receive just compensation.

ARGUMENT

I.

No grounds for review are shown by petitioner.

Petitioner has wholly failed to bring its application for Certiorari within the purview of Rule 19 of the Supreme Court Rules. No conflict of decision between the 5th Circuit and another Court of Appeals was spelled out or even alluded to;[1] no conflict with applicable decisions of this Honorable Court; not even that this is a case of first impression of an important Federal question could be urged by petitioner. Indeed, in seeking a review, petitioner can only quarrel with the plain language of the condemnation statute followed by the government in acquiring the property in question and urge inconvenience to the executive branch as the true grounds for review.

The 5th Circuit Court of Appeals simply construed the Declaration of Taking Act (40 U.S.C.A. Sec. 258) that ". . . upon the filing of said declaration of taking . . . *the right to just compensation for the same shall vest* . . ." to mean what it says and held that respondent, C. M. Dow,

[1] Petitioner does urge that a conflict "in principle" exists between this decision and earlier 5th Circuit decisions to the effect that the time of valuation of property condemned is the time of entry into possession rather than the time title is acquired. e.g., *Anderson* v. *United States* (C.A. 5) 179 F. (2d) 281. However, the court below distinguished these cases upon the ground that an equitable rule for computation of damages should not be used to determine ownership of property. Furthermore, Rule 19 does not contemplate review upon intra-Circuit conflict, even if any such conflict existed (which it does not).

the owner of the land at the time when the declaration of taking was filed in this case and the time of *vesting of the claim* was the owner entitled to just compensation for the land condemned, rather than earlier owners of said land. The court held, on this point:

> "The Declaration of Taking Act fixed a definite time of taking *and of accrual of the claim for compensation* and removed much of the uncertainty theretofore existing . . ."

And, again, the court below held:

> ". . . Upon the filing of the Declaration of Taking the United States became irrevocably committed to the payment of the ultimate award. The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow."

In asking this Honorable Court to review this decision, petitioner not only can point to no conflict of decision, but also is forced to attack the very condemnation statute it chose to proceed under to acquire the land in question (R. 23), and to demand that this Honorable Court ignore or delete by construction the plain language of the Act as to when a claim against the United States vests in the owner.

Addressing itself to this Court (rather than to the Congress, for remedial legislation), petitioner urges that such relief is required by reason of certain procedures adopted by the executive arm of the Government in condemnation cases and the possibility of some disruption thereof — a disruption, however, not borne out by the record in this case. The Federal Government's impatience with a controlling statute provides small ground for invoking the jurisdiction of this Honorable Court; particularly is this true where, as here, the constitutional rights of a land owner to receive just compensation are to be weighed in the balance.

II.

The court below correctly decided that respondent, as the owner when the United States first became bound to take the property, was the proper person to receive just compensation.

Petitioner states that physical occupation of property by a Federal Officer ". . . constitutes a taking (for which) . . . the owner is provided an adequate remedy to obtain compensation . . ." (Brief for petitioner, page 6). In so stating, petitioner ignores settled Federal condemnation law that the United States are ". . . free to abandon the condemnation proceeding at any time before payment of the award and transfer of title, that they take (took) no title until payment, that the possession of the land by the United States does (did) not make these rules inapplicable . . ." *Moody* v. *Wickard*, 78 U.S. App. D. C. 80, 136 F. (2d) 801, 803, 804, certiorari denied, 320 U.S. 775. Land owners claiming that the right to just compensation accrues from physical occupation of their land by the United States have repeatedly been denied recovery. *O'Conner* v. *United States* (C.A. 9, 1946) 155 F. (2d) 425; *U. S.* v. *One Parcel of Land* (D.C., Dist. Col., 1955), 131 F.S. 443, and the many cases therein cited.

Petitioner does not suggest that a wrong result was reached in these cases and that physical occupation alone should irrevocably bind the government to take and pay for property (Cf. Brief for Petitioner, pages 16, 19). Instead, Petitioner's argument appears to be that the land owner loses his land and acquires only an unenforceable "claim" against the government when possession is taken—a "claim" which the government remains free to accept or reject. This unabashed argument, it is submitted, places a very high premium on the convenience of the government, and a very

low value on the property rights of the citizen. Such argument wholly fails to take into account the condemnation rules laid down in the decisions of this Honorable Court.

In *Danforth* v. *United States*, 308 U.S. 270, the Court recognized the rule to be that (1) no "taking" occurs until the condemnor's right to discontinue or abandon the property has ceased and (2) that it is the owner at the time the condemnor becomes *bound* to take the property, not an earlier or later owner, who is entitled to payment. The court held, in the *Danforth* case (308 U.S. at pages 283-284):

> "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment. . . . Until taking, the condemnor may discontinue or abandon his effort."

From *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U.S. 641, to *United States* v. *Dickinson*, 331 U.S. 745, this Honorable Court has consistently held that a "taking" giving rise to the right to just compensation occurs upon the passage of *title* to (and not merely possession of) land being condemned. Thus, in the *Cherokee Nation* case, *supra*, the Court stated (135 U.S. 641 at page 659):

> "Within the meaning of the constitution, the property, *although entered upon pending the appeal, is not taken until compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.*"

In the *Dickinson* case, *supra*, in determining the question of when a cause of action against the Government arose for the taking of lands flooded by a Government dam, the Court expressed the same view in the following language (331 U.S. 745, at page 748):

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate; and when they die."

In the *Dickinson* case, *supra* (as here) one who purchased the land following some "physical occupation" of the land (by flooding) was nevertheless held to be the owner entitled to just compensation. This Honorable Court's ruling in that case was made despite the Government's similar claim that the result in the case could lead only to "demonstrably unsound alternatives". An earlier "taking" was there urged by the Government (as here) so as to make applicable the Anti-Assignment Statute (31 U.S.C. 203). This contention of the Government was overruled. The Government there contended (as here) to no avail that the respondent in that case purchased not land, but a prohibited claim against the Government. The principle upon which the case turned — that property is taken in the constitutional sense only when title passes — has direct application in our present case. As the owner when title to the property passed to the Government, respondent, C. M. Dow, under the constitution, was the owner at the time of the "taking" who was entitled to be paid for the easement then and thereby condemned.

CONCLUSION

In view of the plain language of the Declaration of Taking Act that the claim against the Government vests when the Declaration of Taking is filed, and not before, and in view of the repeated decisions of this Honorable Court that a taking, in the constitutional sense, occurs when the con-

demnor *must* take and pay for the property and when title passes (*Danforth* v. *United States*, 308 U.S. 271), it would seem clear that any claimed inconvenience to the executive branch is beside the point and that the correct result was reached in the court below.

It is, accordingly, respectfully submitted that petitioner's Application for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the above and foregoing brief in opposition have been mailed to J. Lee Rankin, Solicitor General, Perry W. Morton, Assistant Attorney General, and Roger P. Marquis, Attorney, Justice Department, Attorneys for the United States, this 8th day of May, A.D. 1957.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 102

UNITED STATES OF AMERICA,

Petitioner

v.

C. M. Dow

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, C. M. DOW

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IN THE

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October Term, 1957

No. 102

UNITED STATES OF AMERICA,

Petitioner

v.

C. M. DOW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, C. M. DOW

STATEMENT

This case will, perhaps, gain meaning from a chronological chart showing its 15 year progress. A year by year examination of the proceedings shows:

Year	Event
1943	Petition filed and *ex parte* order of possession granted (R. 4, 28). Possession taken and a wartime pipeline built (R. 31, 49).
1944	———
1945	C. M. Dow purchased 617.289 acre tract "subject to the existence of . . . . condemnation proceedings filed by the United States" (R. 56, 57).
1946	Declaration of taking filed and estimated compensation deposited for the first time (R. 17-22). Amended petition filed making C. M. Dow a party defendant (R. 22).

Year	Event
1947	———
1948	Commissioners hearing held and $4,450.00 awarded for Parcel No. 1 "Milby Dow Tract" (R. 37).
1949	Motion to set aside award filed by United States on the ground of absence of former land owners (R. 24). Motion withdrawn (R. 39).
1950	———
1951	———
1952	*Shannon* case (*United States* v. *Shannon*, 342 U.S. 288) decided by this Honorable Court.
1953	———
1954	———
1955	Motion for summary judgment dismissing Dow filed by United States (R. 39).
1956	All former owners of Parcel No. 1 appear and urge that compensation is payable to Dow (R. 51). Summary judgment of dismissal nevertheless entered (R. 48-52). Appeal taken (R. 59). Court of Appeals reverses judgment (R. 68) holding Dow entitled to compensation.
1957	Application for certiorari made by United States (R. 75) and granted by this Honorable Court (R. 75).

The Court of Appeals held that the "taking" by the United States was incomplete when Respondent, Dow, purchased the land in question since the United States had not yet acquired *title* to the property nor had the United States lost the right to abandon possession and reject the property. Accordingly, as expressly provided by the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258a(a)) the claim to compensation had not "vested" in the former owners but,

instead, vested in Dow, who was thus entitled to the just compensation due an owner (R. 67). The opinion of the Court of Appeals is reported in 238 F. 2d 898.

SUMMARY OF ARGUMENT

I.

The court below correctly decided that a claim for compensation for the title to property does not become vested until the condemnor no longer can abandon its taking. Since Petitioner admits, in fact contends, that it is not bound to more than severance or restoration damages by taking possession of property (Brief for Petitioner, 25), the Government did not become bound and the landowner's claim for the loss of title to his land did not vest until after Respondent, C. M. Dow, acquired title to the land in question. This is substantially what is provided by the Declaration of Taking Act, which was followed by the United States in this case in acquiring title.

Under the Constitution, the same result is required. Thus, possession and user of land by a condemnor does not take away the landowner's right to alienate the land until payment is made or secured. Under settled rules a taking under the Constitution may be likened to a contract; the condemnee is not bound unless and until the condemnor is also bound. The point at which this occurs is when just compensation is ascertained and when the condemnor may no longer avoid paying such compensation by abandoning the property.

II.

The judgment of the Court of Appeals does substantial justice and prevents a windfall to the Government in this case. Likewise, there is nothing in the decision below inherently unfair to future litigants or which opens the door

to future evils. The Government has a prompt and adequate remedy if evils should develop, e.g. by the filing of declarations of taking when possession is first taken and thus avoiding manipulations of the value of land between the time of "possession" and "taking." Future condemnees can recover for both use and possession of their property, on the one hand, and the taking of their title, on the other hand, under the decision below. The same result, of just compensation to the person or persons entitled thereto, will accrue in either case and this is all the United States and the citizen are entitled to under the Constitution.

III.

The Anti-Assignment Act has no application to Respondent's claim. The 1945 deed to Respondent, C. M. Dow, was effective under Texas law to carry the title to the entire 617.279 acre tract of land, including Parcel No. 1 in its entirety. The operation of Texas law gives this effect to the deed, not the voluntary act of the parties, and, accordingly, there is no violation of the Anti-Assignment Act (10 Stat. 170, as amended, 31 U.S.C. 203). This act has always been interpreted as not prohibiting assignments by operation of law.

The Anti-Assignment Act should not be used to effect restraints on alienation of property which do not otherwise exist by Texas Law. Texas law properly distinguishes between claims for *damages* to land growing out of condemnation proceedings, on the one hand, which are not conveyed by a deed, and title and other incidents of ownership, on the other hand, which are held to be conveyed by a deed pending condemnation. The policy of the Anti-Assignment Act does not reach conveyances such as the present one. Particularly is this so where the Government admittedly

remained free to abandon its proceeding or limit it after the date of Respondent's deed to the land.

The *Shannon* case is to be distinguished. A claim for damages against the Government was there conveyed by separate assignment, which claim would not pass as an incident to the deed, as in the present case.

Alternatively, the *Shannon* case should be re-examined and no longer followed since the rule there set forth allows a federal statute to thwart local law on a matter reserved to the states — the matter of conveyance of title to lands — and so places an unreasonable restraint on alienation of property. Likewise, in the present case, it may enable the United States to acquire property without compensation being paid to anyone, since the former owners may be barred by the six-year statute of limitations. This has already been urged by the United States. (See: Brief for Petitioner, 20, footnote.)

ARGUMENT

I.

A. The "Taking" was not complete and the claim for compensation did not vest until the United States became committed to take the land. This did not occur until after Respondent acquired the land in question.

At the outset, it may be admitted that there are apparent difficulties following on a holding that a "taking" is not complete when possession is first acquired by a condemnor. Problems of the date of valuation, (*Anderson* v. *United States*, 179 F. 2d. 281 (C.A. 5)), the date from which interest is to run (Cf. *Albrecht* v. *United States*, 329 U.S. 599) are easier solved by calling the date when physical possession is acquired the date of "taking." It is likewise true that one court, when faced with the problem of a transfer of title

following a condemnor's taking possession, expressed the view in a *dictum* that the owner at the time of the taking of possession is the owner entitled to compensation despite the fact that the United States may abandon thereafter. (*23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C.A. 6)). The same court, however, applied an Ohio doctrine of "relation back" to the date of an option later exercised in order to hold a subsequent transferee entitled to the award in that case. Accordingly, that case and the present problem did not reach this Honorable Court.

Respondent, however, would hasten to add that the idea will not hold water that any "easy" solution to the Court's problem is provided by calling the date of possession the *completion* of a "taking." Instead, this "solution" itself raises new problems of a more serious nature because of the requirement of the United States Constitution that title does not pass in condemnation proceedings until *payment* is made or secured to be made. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Hurley* v. *Kincaid*, 285 U.S. 95. ". . . The owner is protected by the rule that title does not pass until compensation has been ascertained and paid." *Danforth* v. *United States*, 308 U.S. 271, 284.

The "embarrassing question" referred to by Mr. Justice Harlan (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 659) — which would be raised under the Fifth Amendment to the United States Constitution if an Act of Congress allowed the taking of possession without payment to serve also as the passage of title to the condemnor — will not remain exorcised. It is with us in this case, arising *not* under an Act of Congress but under what Petitioner would have this Honorable Court create out of whole cloth — apparently a "Federal Common Law" of condemnation — one in which the landowner becomes bound, but the United States does not; one in which not only the landowner's possession and user of his land are lost upon

the Government's taking possession, but also the only remaining prop of the "bundle of rights" of his ownership (Cf. *United States* v. *General Motors Corporation*, 323 U.S. 373, 378) is also lost — e.g. his right to sell and convey his property.[1] The rule sought by Petitioner would, in effect, deprive landowners of their property *without any provision being made for compensation therefor*, contrary to this Honorable Court's consistent interpretation of the Constitution.

B. A landowner does not lose his right of alienation of the land when the condemnor takes possession or until provision for payment is made.

Where *title* to land is concerned, our Federal Constitution requires the United States to "first pay" or become committed to pay before taking title to the property of a citizen. *Danforth* v. *United States*, 308 U.S. 270; *Hurley* v. *Kincaid*, 285 U.S. 95. Even where the Declaration of Taking Act (40 U.S.C.A. 258 (a)) is followed, only a "defeasible" title is acquired by the filing of a Declaration and deposit and it is only upon entry of the *final* judgment in condemnation proceedings that a citizen loses all title to his land. *Catlin* v. *United States*, 324 U.S. 229, 240, 241.

The consequences which follow the "first pay" requirement of our Constitution are spelled out in the cases arising in State Courts — the vast majority of the state constitutions having the same "first pay" requirement. See cases collected in Annotation: "Conveyance Pending Condemnation", 82 A.L.R. 1063. In such jurisdictions (including Texas) the taking of possession *without provision for pay-*

[1] Perhaps Petitioner would concede that *one* right or privilege of ownership would remain — that of paying taxes. Cf. *United States* v. *999.30 Acres*, 114 F. S. 756 (D.C. N.D.).

ment does not constitute a "taking" within the meaning of the Constitution. A landowner's conveyance when possession alone is taken by the condemnor is uniformly given effect and carries to the purchaser the *title* of his vendor and the right to the award. *Fordyce* v. *Wolfe*, 82 Tex. 239, 18 S.W. 145; *Railway Company* v. *Ruby*, 80 Tex. 172, 15 S.W. 1040; *Obst* v. *Covell*, 93 Minn. 30, 100 N.W. 650; *Price* v. *Engelking*, 58 Ill. App. 547; *Bank of America* v. *Glendale*, Cal. Sup. Ct. 50 P. 2d 1035; *In Re 12th Avenue South*, Wash. Sup. Ct. 132 P. 868; *Hamilton* v. *Big Medicine Drainage District No. 1*, Mo. Sup. Ct. 261, S.W. 940; *Griffith* v. *Drainage District*, Iowa Sup. Ct., 166 N.W. 570; See Annotation — "Conveyance Pending Condemnation", 82 A.L.R. 1063; 2 Nichols "Eminent Domain", (1950 Edition) Sec. 5.21, p. 25.

In *Obst* v. *Covell*, 93 Minn. 30, 100 N.W. 650, 652, the Court held:

> ". . . The person who is such owner *at the time the rights under the condemnation proceedings vest in the railroad company* is entitled thereto . . . 'if the proceedings were not completed, but inchoate, *and the company did not acquire a title to the easement prior to the execution of the deed*, the premises passed to Carli, and he became the owner, and the right to damages was in him, as incident to the ownership.'" (Citing *Carli* v. *Stillwater Ry. Co.*, 16 Minn. 260) (emphasis supplied).

And in *Price* v. *Engelking*, 58 Ill. App. 547, 552, the basic reasoning of these cases is shown as follows:

> "When, therefore, appellants, after judgment, conveyed these premises to Henry Engelking, they conveyed all the rights which they had growing out of the ownership of this property. *If nothing further was done by the city, Henry Engelking would have remained the owner they made him.* As thereafter the city paid into court the amount of the judgment, the administratrix of Henry Engelking is entitled to such

money. It was paid for his land, his title, his possession, not that of appellants.'" (Emphasis supplied.)

C. The continued existence of the right to abandon shows that there is no constitutional "Taking" when possession is acquired.

It is admitted by Petitioner that the United States remained free to abandon the condemnation despite the taking of possession and until long after Respondent acquired title to the property (Brief for Petitioner, 25). *Moody* v. *Wickard*, 136 F. 2d 801 (C. A. D. C.), certiorari denied, 320 U.S. 775; *O'Connor* v. *United States*, 155 F. 2d 425 (C. A. 9).

As shown by these cases, it is because of the requirement of *prior payment* that the taking of possession does not terminate the condemnor's right to abandon or discontinue the proceedings. The rule is that " . . . until taking, the condemnor may discontinue or abandon his effort . . . " *Danforth* v. *United States*, 306 U.S. 270, 284. For a taking of possession to constitute the "*punctum temporis*" of the taking, the taking of possession *must result in a transfer of title* to the condemnor and a vested right to compensation in the vendee — a right which the condemnor can not destroy by abandoning the property. 6 Nichols "Eminent Domain" Sec. 26.42 (1) p. 192, 193 (1950 Edition). This rule is inherent in the holding of this Honorable Court that "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement *or in course of time.*" *United States* v. *Dickenson*, 331 U.S. 745, 748. "Course of time", (e.g. the lapse of a prescriptive period) would be unnecessary if "possession" alone equalled a "taking".

The great delays in the proceedings in this case stem directly from the United States' continuing power to aban-

don. In 1943, 1944 and 1945, the pipeline in question was merely another "wartime" facility which might well be abandoned by the United States when the emergency should cease. The landowner then would rid his land of an unsought servitude; a prospect much more attractive than any compensation. Not until May 31, 1946 did the United States become committed to taking a permanent and perpetual right-of-way. At that date Respondent was the owner. At that date, finally, the taking became complete and the claim vested in the then owner, Dow.

D. At the very least, Respondent acquired by his deed the right to the award for the title thereafter acquired by the United States — even if the right to damages for possession was not conveyed.

The "first pay" jurisdictions provide a solution to the Court's dilemma of choosing the "taking" of possession, on the one hand, or the "taking" of title, on the other hand, as the *"punctum temporis"* of the creation of a claim in the landowner. In *Fordyce v. Wolfe*, 82 Tex. 239, 18 S.W. 145, the Court held that a deed pending condemnation conveyed title to the transferee, including the right to receive the award for the permanent easement condemned, but *did not* convey the right to recover damages for the period of time during which the condemnor held possession before the transfer. The Court held (18 S.W. 145-146):

> "At the time, therefore, when appellee conveyed the land to Measles, the railroad company was a mere trespasser, and appellee's title was unimpaired by its entry upon and use of its right of way. He had, however, right of action against it for such damages as resulted from the trespass. It was clear, we think, that by his warranty deed all his title to the land passed to Measles; and it is equally clear that his right of action to re-

cover the damages for the mere trespass did not pass. For the latter he had a right of action, and it was not affected by his conveyance to his vendee. The measure of his damages was the injury to the land which resulted from the mere construction of the railroad, and compensation for the use of so much of the land as was occupied by the company from the time of the entry until the date of his conveyance to Measles."

* * * * *

"Appellee and appellant Measles are entitled to recover sums which, added together, will equal the amount the appellee would have been entitled to recover had he never conveyed, and no more."

This case has been quoted from at length because (1) the reasoning of Judge Gaines is deemed persuasive (2) it points the way to a solution of a perplexing problem (3) it answers completely the "manipulation" argument of Petitioner (Brief, 38) and (4) this is a Texas condemnation completed under the aegis of the Conformity Acts (40 U.S.C. Sec. 258) which were in effect until the passage of Rule 71-A F. R. C. P. This Texas authority, accordingly, has even greater significance. The same result as in *Fordyce* was reached under Massachusetts law by District Judge Charles E. Wyzanski, Jr., a judge of admitted probity, in *United States* v. *40,379 Square Feet of Land*, 58 F.S. 246 (D.C. Mass.). In that case the Court held the United States liable to pay for use and occupancy upon its taking possession of certain property and until a declaration of taking was filed, when, for the first time, title passed and compensation for the title became due. Massachusetts law was relied on as controlling. Division of an award, of course, is no novelty in federal condemnation, and the division into "possessory" claim, on the one hand, and "reversionary" claim, on the other hand, occurs every time premises held under a lease

are condemned. Cf. *Singer* v. *United States*, 115 F.S. 166 (Ct. Cl.).

E. The declaration of taking act "vests" the landowner's claim at the time title is taken by the condemnor.

It is respectfully submitted that, as a plain matter of statutory interpretation of the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258 (a)), reasonable minds cannot differ as it does not admit of two meanings. In plain language, it "vests" the claim in the landowner by the self-same act of filing and deposit of compensation as it also "vests" title in the condemnor. It states that it is by such filing and deposit that lands " . . . *are thereby taken*" for the use of the United States.

No amount of "psychoanalysis of Congress" (Cf. Justice Jackson, concurring in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 319) will detract from the plain language of this Act. It was followed by the United States in this case. The United States, having picked its authority for the condemnation in this case, should be left to the consequences. One of the consequences should be the duty to pay respondent on his claim for compensation which, under the statute, "vested" in him on May 31, 1946, the date of the filing of the Declaration of Taking (R. 17).

Even if this Honorable Court is unable to see the Declaration of Taking Act as settling the matter, it is submitted that the Act, at the very least, *must* have been written by a Congressional committee steeped in the lore of the "first pay" jurisdictions, and that the intent of Congress was to adopt the view of "first pay" for United States condemnations. In this, the Congress had ample warrant from the pronouncements of this Honorable Court that title in condemnation doesn't pass until payment. *Danforth* v. *United States*, 308 U.S. 271.

II.

The Decision of the Court Below Produces a "Fair Result".

There is a distinct possibility that the government will acquire the land here in question without paying anyone if the judgment of the court below is reversed. As has been suggested by Petitioner, limitations may bar Respondent's vendors. This is a result probably not originally intended by Petitioner or of moment beyond the immediate case. However, in examining, as Petitioner urges (Brief for Petitioner 34-39), the "fairness of the result" it should not be overlooked. As has been pointed out herein, the rule advocated by Petitioner would produce the unfair result where possession has been taken by a condemnor of causing an owner *who is unpaid* to nevertheless lose the last vestige of "title" remaining to him, e.g. the right to sell and alienate the land in question. By whatever name it is called, a "taking" without just compensation would result contrary to the constitution.

Concerning the imagined evils to flow from the decision of the Court below, it may be said that there is available to the United States within its own hands a plain adequate remedy at law — one not depending upon any Court but only upon the action of United States attorneys. If even a remote possibility exists that a separation of "possession" and "taking" will open the door to manipulations increasing the government's liabilities, as urged by Petitioner, the plain adequate remedy is to file a "declaration of taking" concurrently with the taking of possession. If this is done, no possible harm can result. In these circumstances, the picture of a litigant with independent means of self-help appealing nevertheless to a court to create a rule of law

solely to protect him from the indolence of his own servants is one which should not commend itself to the court.

Likewise, under the authorities cited in this brief, prior landowners are entitled to compensation for the Government's use and possession of land, so long as the amount which the Government is required to pay *in toto* is no more than would result had there been no conveyance. *Forbyce v. Wolfe*, 82 Tex. 239, 18 S.W. 145; *United States v. 40.379 Square Feet of Land*, 58 F.S. 246 (D.C. Mass.). Accordingly, there is nothing to the argument that administrative officers will be able to reduce the overall compensation by withholding filing of a declaration of taking. Nothing in the decision of the Court below prevents prior landowners from claiming compensation for the possessory period before they convey. If anything stands in their way, it will be the pleading of the 6 year statute of limitations by Petitioner, which is merely an incident of the long delays in this case and which can have no application to future litigants.

III.

A. Respondent received an assignment of the right to compensation by operation of law as an incident to his deed — an assignment not prohibited by the anti-assignment act.

The Anti-Assignment Act (31 U.S.C. 203) has long been restricted by the Courts to cases presenting specific evils. Examples of assignments *not* within the prohibition of the Act include transfers by operation of law, *Erwin v. United States*, 97 U.S. 392; assignments for the benefit of creditors, *Goodman v. Niblack*, 102 U.S. 556; transfers by judicial order to a judgment creditor, *Price v. Forrest*, 173 U.S. 410; by subrogation, *United States v. American Tobacco Co.*, 166 U.S. 468, and conveyances to partners or stockholders,

Mitchell Canneries v. *United States*, 77 F.S. 498 (Ct. Cl). In the Annotation: "Federal Anti-Assignment Statutes," 12 A.L.R. 2d 461, 465 the author states:

> "Perhaps the so-called 'operation of law' exception could be even more broadly stated to the effect that assignments or transfers *which are incidents of a pre-existing bona fide status or relationship not created for the sole purpose of transferring a claim against the United States are not within the intent of the Anti-Assignment Acts.*"

Perhaps the most analogous transfer to the deed to Respondent in this case is the transfer of a lease which has been held to carry with it, as an incident, and without violating the Anti-Assignment Acts, the assignment of claims for *rent* against the United States. *Freedman's Savings and Trust Co.* v. *Shepherd*, 127 U.S. 494. Likewise, on the same theory of an assignment "by operation of law", claims for infringement of a patent are held to be transferred as incidents to the transfer of the patent without violating these acts. *Thayer* v. *Pressey*, 175 Mass. 225, 56 N.E. 5; *Federal Mfg. & Printing Co.* v. *United States*, 41 Ct. Cl. 318. The reasoning of these cases would clearly uphold the transfer in question here.

In this connection, the reasoning of the rent and patent assignment cases has been applied to carry to an assignee of a lease a claim against the United States based upon an obligation to make repairs to the premises. *Singer* v. *United States*, 115 F. S. 166 (Ct. Cl.). The Court of Claims there faced the problem of the transfer of a pre-existing but "inchoate" claim such as now faces this Honorable Court, so the reasoning of the Court may prove helpful. The Court held, on the question of the applicability of the Anti-Assignment Act (115 F. S. 166, 170):

"We do not agree with the defendant's contention that the statute is applicable. It should be noted at the outset that Mrs. Bickham did not purport to assign a *claim* as such. Only if the transfer of the lease was tantamount to the assignment of a claim was the statute violated. While it is true that all alleged injury to the property occurred prior to plaintiff's purchase of it from Mrs. Bickham, under our construction of the lease agreement defendant's dereliction of duty as to the condition of the premises did not become apparent and complete until the termination of the lease. *Consequently, the claim accrued to plaintiff directly and not by way of assignment.* Manifestly the antiassignment statute has no application under such circumstances. *Viewing the lease in its entirety the conclusion that a cause of action ripened only at the termination of the leasing period is supported by both the language of the instrument and the practical construction thereof by the parties themselves.* (Italics ours.)

The analogy between the "ripening" of a "cause of action" after the transfer in the *Singer* case and the "completion" of a "taking" after the transfer as held by the Court below in the present case seems inescapable and the reasoning is apt to point the way to a like solution here.

B. The Shannon Case distinguished.

The Anti-Assignment Statute was construed in *United States* v. *Shannon*, 342 U.S. 286, to bar recovery by an assignee of a claim for reparations against the government for damages caused to buildings by soldiers of the United States. The assignment was made as a part of a contract of sale on the property in question and was by separate instrument. It did not arise by operation of law as an incident to the deed, but was by express assignment. The majority opinion (5 Judges) recognized the clear distinction between

transfers of claims against the government arising by operation of law and the mere "buying a claim against the government". Mr. Justice Douglas' dissent was placed on the ground that the vendors of the claim could not keep any recovery but would hold it in trust for the vendee. Since all parties at interest were present in the same controversy, he could see no reason to deny recovery to the assignee. The majority thought otherwise.

The distinction between this case and the *Shannon* case is clear. There, by express words, a claim against the government was assigned which was already in existence and was vested in the assignors. By Texas law, such a claim could not pass to a purchaser as a mere incident to his deed. *Fordyce* v. *Wolfe*, 82 Tex. 239, 18 S.W. 145; *Texas Central Ry.* v. *Brown*, 86 S.W. 659 (Tex. Civ. App.). Contrary to *Shannon*, it is the operation of Texas law on Respondent's deed, and not any "procedural contrivance", which is the basis for his claim to the award.

The policy against trafficking in claims against the United States does not require that the Anti-Assignment Acts be extended to prevent Texas deeds being given the effect they would otherwise have by Texas law. If the *Shannon* case does require this result, then the rule of that case should be re-examined and no longer followed. The security of land titles and the operation of conveyancing rules are matters reserved to the individual states, and such rules should not be thwarted by the application of a federal statute.

CONCLUSION

The needs of the United States for prompt acquisition of property for public use for which the government is required to pay only just compensation can be fully met under the holding of the Court below. The pronouncements of this

Honorable Court safeguarding the citizen's title to his property until payment is made or secured have as their necessary corrollary that a conveyance *before* payment passes to a transferee such title, including the right to receive the award. So long as the Government pays no more by reason of this conveyance, it has no cause to complain. The decision of the Court below was right and should be affirmed.

Respectfully submitted,

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